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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 280.

WILLIAM SENSENDERFER, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JANUARY 3, 1887.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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a The United States of America to Samuel A. Kemp, Martha Kemp, James W. Kemp, Ida Bell Kemp, R. H. Payne, Thomas Wasson, Jr., John W. Payne, Jr., and J. T. Hedges, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein William Sensenderfer — plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John W. Henry, chief justice of the supreme court of the State of Missouri, this — day of June, in the year of our Lord one thousand eight hundred and eighty-six.

JNO. W. HENRY,
Chief Justice.

b [Endorsed:] United States — court, western district of Missouri, Eastern division. Wm. Sensenderfer, appellant, *vs.* Sam'l A. Kemp *et al.*, respondents. Citation. Filed ——, 187– —— ——, clerk.

UNITED STATES OF AMERICA, }
Western District of Missouri, } *ss:*

I hereby acknowledge due service of the within citation this 24th day of June, A. D. 1886.

GEO. P. B. JACKSON,
Attorney for Defendant in Error.

c UNITED STATES OF AMERICA, *ss:*

(Seal of the United States Circuit Court for the Western District of Missouri, Eastern Division.)

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1884, thereof, between William Sensenderfer, appellant, and Samuel A. Kemp, Martha J. Kemp, James W. Kemp, Ida Bell Kemp, R. H. Payne, Thomas Wasson, Jr., John W. Payne, Jr., and J. T. Hedges, *are* respondents, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly,

you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said U. S. Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said U. S. Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twelfth day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, eastern division, dated as aforesaid.

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri.

Allowed by—
JNO. W. HENRY,
Chief Justice.

d [Endorsed:] No. —. United States circuit court, western district of Missouri, eastern division. Wm. Sensenderfer, appellant, *vs.* Sam'l A. Kemp *et al.*, respondents. Writ of error to the supreme court of the State of Missouri. Returned and filed — day of ——, 187–. —— ——, clerk.

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Supreme Court of Missouri, }

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 20th day of September, A. D. 1886.

[Seal of the Supreme Court.]

HENRY W. EWING, *Clerk.*

1 STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 2d day of April, A. D. 1881, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript, which is in the words and figures as follows, to wit:

STATE OF MISSOURI, }
County of Pettis. }

Pleas before the circuit court of Pettis county, at a term begun and holden in the city of Sedalia, county and State aforesaid, on the 3d day of January, A. D. 1881, before the Honorable John P. Strother, judge of the sixth judicial circuit of the State of Missouri.

Style of Action.

WILLIAM SENSENDERFER, Plaintiff,
against
SAMUEL A. KEMP, MARTHA J. KEMP, JAMES W. KEMP, IDA BELL KEMP, R. H. Payne, Thomas Wasson, Jr., John W. Payne, Jr., and J. T. Hedges, Defendants.

Lost Petition.

Be it remembered that heretofore, to wit, on the 13th day of August, 1879, a petition was filed in the above-entitled cause in the office of the clerk of the circuit court in and for the county of Pettis, which said petition has since been lost. Upon said petition a summons was issued to the sheriff of Pettis county on the — day of ——, 1879, which was returned executed on the — day of ——,
2 1879, which said summons is also lost.

And afterwards, to wit, on the 13th day of September, 1880, it being the third day of the September term, 1880, of the circuit, the following proceedings were had in said cause, to wit:

Record Entry ≠ —. Substituted Petition Filed.

WM. SENSENDERFER
vs.
SAMUEL A. KEMP *et al.*

Now, at this day, comes the plaintiff, by his attorneys, and by consent files substituted petition.

And now, by consent, minor defendants, by guardian *ad litem*, join in answer of Martha J. Kemp, and plaintiff now files reply to amended answer of Samuel A. Kemp, Ida Belle Kemp, James W. Kemp, and Martha J. Kemp.

Which said substituted petition is in words and figures as follows, to wit:

Substituted Petition.

In the Pettis County Circuit Court. September Term, 1879.

WILLIAM SENSENDERFER, Pl'ff,
against
3 SAMUEL A. KEMP, JAMES W. KEMP, IDA BELLE KEMP, Martha J. Kemp, R. H. Payne, Thomas Wasson, Jr., Berry Greer, Jr., John W. Payne, Jr., and J. F. Hedges, Def't-.

Plaintiff states that on the — day of April, 1871, he was entitled to the possession of the following-described premises in Pettis county, Missouri, to wit, the W. ½ of the N. W. ¼ of section 24, township 47, range 21, and that, being so entitled to the possession thereof, one William T. Kemp, the ancestor of said defendants, Samuel A. Kemp, Ida Bell Kemp, and James W. Kemp, and the husband of defendant, Martha J. Kemp, afterwards, on the first day of May, 1871, entered into such possession and unlawfully with-eld the possession of the same from plaintiff up to the death of said William T. Kemp, which occurred in the month of October, 1874.

That ever since the death of said William T. Kemp the said defendants, Samuel A. Kemp, Ida Belle Kemp, and James W.
4 Kemp, children and heirs of the said William T. Kemp, and def't, Martha J. Kemp, widow of said William T. Kemp, deceased, have continued to unlawfully wit-hold from plaintiff the possession of said premises, thus having unlawfully entered and remained in possession of the same ever since the death of said William T. Kemp and still continuing to unlawfully wit-hold the same from plaintiff; that afterwards, to wit, on the — day of ——, 1877, the other defendants entered into such premises and together with the said defendants have ever since and now unlawfully wit-hold from plaintiff the possession thereof, to his damage in the sum of five hundred dollars.

Plaintiff further avers that the monthly value of the rents and profits of said premises is fifty dollars per month.

Wherefore he demands judgement for the recovery of the premises and 500 dollars' damages for unlawfully wit-holding of the same from plaintiff, and fifty dollars for monthly rents and profits from the time of the original unlawful entry by said Wm. T. Kemp to the time the possession of the premises shall be given to pl'ff.

SNODDY & SHORT,
Att'y- for Pl'ff.

5 Be it further remembered that on the 6th day of September, 1879, it being the 6th day of the September term, 1879, of this court, there was filed herein an answer; which said answer is in words and figures as follows, to wit:

Answer.

In the Circuit Court of Pettis County.

WM. SENSENDERFER, Pl'ff,
vs.
SAM'L A. KEMP *et al.*, Def't-.

Now, on this day, come the defendants, and for answer to the petition herein deny each and every allegation thereof.

JNO. F. PHILIPS, *For Def'ts.*

And afterwards, to wit, on the 5th day of January, 1880, it being the first day of the January term, 1880, of this court, the following further proceedings were had in said cause, to wit:

Rec'd Entry # 2. Def't- File Separate Am'd Answer.

WM. SENSENDERFER
vs.
SAM'L A. KEMP *et al.*

Now, at this day, come defendants, Samuel A. Kemp, Ida Belle Kemp, and Martha Kemp, by their attorneys, and file their separate amended answer, and the court now appoints P. H.
6 Sangree guardian *ad litem* for minor defendants; which said separate amended answer is in words and figures as follows, to wit:

Separate Amended Answer.

In the Circuit Court of Pettis County, State of Missouri. January Term, 1880.

WILLIAM SENSENDERFER, Plaintiff,
vs.
SAMUEL A. KEMP *et al.*, Defendant-.

Now, on this day, come the defendants, Samuel A. Kemp, Ida Bell Kemp, James W. Kemp, by their guardian *ad litem*, P. H. Sangree, and Martha J. Kemp, and for their separate amended answer to plaintiff's petition deny that the plaintiff on the — day of April, 1871, or at any other time was entitled to the possession of the land described in the petition. They admit that Wm. T. Kemp on the first day of May, 1871, had the possession of said land, but they deny that he unlawfully withheld the possession thereof from plaintiff up to the time of his death, or that the defendants have continued to unlawfully withhold from plaintiff the possession thereof since the death of Wm. T. Kemp, or that they were
7 in the possession of said land at the institution of this suit, or that since — day of ——, 1877, have they with their code-

fendants herein, unlawfully or otherwise, withheld from plaintiff or had the possession of said lands, except as hereinafter stated.

They deny that the plaintiff is damaged in the sum of five hundred dollars or any other sum, as charged in the petition, or that the monthly value of the rents and profits of the premises is fifty dollars; and they wholly deny that the plaintiff is entitled to the judgement prayed for in his petition.

Defendants, further answering, state the facts of this matter to be that heretofore, to wit, on the 13th day of June, 1848, the following-described lands, situate and being in the county of Pettis, State of Missouri, to wit, the west half of the northwest quarter of section 24 and the southeast quarter of section 14 and the northeast quarter of section 23, in township 47, range 21, belonged to and were of the public domain of the United States of America, and as such were thereby law- subject to entry, as hereafter stated, at the district land office, then located at Clinton, county of Henry, State of Missouri; that one William R. Kemp, being the holder and owner of military land warrant 1384, which entitled and authorized him to
8 enter and purchase therewith, at said land office, the land aforesaid, did, on the 13th day of June, 1848, at said land office, with the proper and acting officer and agent of the Government aforesaid, enter, and purchase the land aforesaid and then and there received from said officer and agent a duplicate receipt or certificate in due form of law evidencing such entry, and the said officer and agent then and there did enter or cause to be entered upon the plat book and record by him kept for such purpose the fact of such entry and sale; that thereupon said William R. Kemp surrendered and delivered up to said officer and agent said military land warrant, as by law in such cases provided; that said William R. Kemp immediately thereafter took possession of said lands, had the same surveyed and marked off, used and occupied the same, and paid the taxes thereon continuously, openly, notoriously, and adversely under claim of such title until the year 1853, when the west half of the northwest quarter of said section twenty-four (24) was, under the provisions of a deed of trust made by said William R. Kemp and wife to Anthony S. Walker and W. W. Walker, trustees, for the use and benefit of one William Kemp, sold and con-
9 veyed by said Anthony S. Walker, trustee aforesaid, to said William Kemp.

Whereupon the said William Kemp took possession thereof under *under* his said purchase and claim of title, and used, occupied, and improved the same, and paid the taxes thereon openly, notoriously, adversely, and continuously to the 18th day of February, 1868, when he sold and conveyed the same to one W. D. Cummings, who thereupon, under claim of title, took possession under his said deed of this land, and used, occupied, and improved the same and paid the taxes thereon openly, notoriously, adversely, and continuously to the 26th day of January, 1869, when he sold and conveyed the same by deed to one William T. Kemp, who thereupon, under his said deed and claim of title, entered into possession of said land and made lasting and valuable improvements thereon, and continu-

ously, notoriously, openly, and adversely used and occupied and paid the taxes on the same under claim of title, and was occupying the same as his homestead up to the time of his death, on the 23rd day of October, 1874.

Defendants say that said William T. Kemp died intestate, leaving the defendant, Martha Kemp, the surviving widow, and the other defendants to this answer, who are his children, as his sole
10 heirs-at-law. The defendant, Martha Kemp, as widow as aforesaid, has since the death of her said husband been renting out the said premises to various tenants, and was so renting the said land at the time of the institution of this suit to a part of the other codefendants not joining in this answer, so renting it in separate parcels to them separately.

Defendants say that many years ago the said William R. Kemp removed from this county to the State of Oregon, and died just before his arrival there, and, as these defendants are informed, he took with him among his other papers the said receipt or certificate evidencing the said entry of said land, and the same was, as they are informed, lost with his other papers on said trip. They allege that the said William P. Kemp, in 1871, discovered that neither the said William R. Kemp nor those holding under him had ever received from the Government a patent for the said west half of the northwest quarter of section twenty-four (24), and on application to the General Land Office of the United States for such patent the Commissioner forwarded to him, the said William T., an exemplification of a patent from the records in said Land Office showing that a patent, of date June 1st, 1850, had been issued to said William R. Kemp for the lands so entered by him as aforesaid,
11 except for the said west half of the northwest quarter of section twenty-four (24), but in *line* thereof included the west half of the northwest quarter of section twenty-five (25) of the said township and range, which variation from the certificate of entry issued and delivered to said William R. Kemp was and is a manifest error and mistake of the officers and agents of the Government aforesaid, for they allege that said William R. Kemp neither did enter nor could have entered, in connection with other lands in said section-fourteen (14) and twenty-three (23), land in said section twenty-five (25), and the agents and officers of the Land Office Department of the Government, so knowing and understanding that the said William R. Kemp had not entered said land in section twenty-five, 25, afterwards permitted the northwest quarter of said section twenty-five, 25, to be entered by one Berry L. Greer, and on the 15th day of July, 1854, issued and delivered to said Greer a patent from the Government aforesaid therefor, and likewise permitted one Simeon Payne to enter the southwest quarter of the northwest quarter of said section twenty-five, 25, and on the 1st day of May, 1854, issued and delivered to him a patent therefor from the Government aforesaid, and the said Greer and Payne thereupon and under their
12 respective patents entered into possession of their respective parcels of said section twenty-five, 25, and have ever since held and enjoyed the same, which said patents to them the said

Greer and Payne have ever since their issue appeared of record in the office of the Land Department aforesaid, and of record in the office of the recorder of deeds for the county of Pettis aforesaid. Defendants say that they are informed, and so state the fact to be, that the said patent purporting as aforesaid to have been issued to William R. Kemp was never in fact received by him or any one claiming under him, and the said exemplification received by said William T. Kemp was the first intimation of its existence, nor was the error or difficulty, as hereinbefore shown, ever known or suspected, either by said William R. or those claiming under him until the plaintiff herein asserted title to the said west half of the northwest quarter of section twenty-four (24) under the patent hereinafter mentioned.

Defendants say that after all the acts and transactions aforesaid in respect to said land and twenty-seven years after the entry thereof as aforesaid by William R. Kemp, the plaintiff, whose occu-
13 pation seems to have long been and then was to search out and discover supposed defects in the title to lands of those who had failed or neglected to obtain from the Government patents for the lands paid for, and in good faith entered by them, as in the case of said William R. Kemp, and by fraud and cunning to obtain patents therefor to himself, so as to defraud the rightful and equitable owners of their estate and homes; and by inquiry and investigation in the pursuit of his said business, discovered that no patent had issued to said William R. Kemp, or those claiming under him, for the said west half of the northwest quarter of section (24) twenty-four, did, on the 20th day of April, 1871, with the fraudulent intent and purpose to wrong and cheat the said William T. Kemp out of his said land and to deprive him of his homestead thereon, obtain from said Government a patent for said land to himself, and has had the same recorded in the recorder's office in the county of Pettis aforesaid, and is claiming title to said land by virtue thereof, and is trying to obtain the possession thereof under said patent. These defendants aver that the plaintiff procured said patent with notice of the rights and equity of the said William T. Kemp in and to said land, and that he holds the patent aforesaid in trust
14 and for and to the use of these defendants as the heirs-at-law and legal representatives of William T. Kemp, deceased.

Whereupon they pray that this court hear and examine into the facts and allegations aforesaid, and if satisfied of the truth thereof will order, adjudge, and decree that the plaintiff holds the title acquired by him under the patent aforesaid to the west half of the northwest quarter of section twenty-four (24), township forty-seven (47), range twenty-one (21), in trust and for the use and benefit of these defendants, and that the right and title so acquired by him be divested and the same vested in these defendants, and for all proper relief.

And the defendants further say that the lands aforesaid have not been in the possession of the plaintiff or any one under whom he claims for thirty consecutive years next before the institution of this suit, or next befor- Feb'y 27th, 1874, nor has he or any one under

whom he claims paid any taxes thereon for all that period of time, and the equitable title to which said land has eminated from the Government, as hereinbefore stated, more than ten years next before the institution of this suit and before the 27th day of February, 1874; and the said plaintiff has not brought this action to recover the same within one year from and after the 27th day of
15 Feb'y, 1874, as by statute in such case made and provided, by reason whereof the plaintiff 's alleged cause of action is barred, and defendants so plead the same.

JNO. F. PHILIPS,
Att'y for Def't.

And afterwards, to wit, on the 13th day of September, 1880, it being the third day of the September term, 1880, of this court, the following further proceedings were had in said cause, to wit:

Rec'd Entry # 3. Minor Def'ts, by G. ad L., Join in Answer. Pl'ff Files Am'd Reply.

WILLIAM SENSENDERFER
vs.
SAMUEL A. KEMP *et al.*

Now, at this day, comes the plaintiff, by his attorneys, and by consent files substituted petition; and now, by consent, minor defendants, by guardian *ad litem*, join in answer of Martha J. Kemp; and plaintiff now files reply to amended answer of Samuel A. Kemp, Ida Bell Kemp, James W. Kemp, and Martha J. Kemp.

Which said plaintiff's reply is in words and figures as follows, to wit:

16 *Pl'ff's Reply.*

STATE OF MISSOURI, *Pettis County,* } *ss:*

In the Circuit Court.

WILLIAM SENSENDERFER, Pl'ff,
against
SAMUEL A. KEMP *et al.*, Def'ts.

Now, at this day, comes again the plaintiff and, for reply to the amended answer of Samuel A. Kemp, Ida Belle Kemp, James W. Kemp, and Martha J. Kemp, admits that on the 28th day of December, 1840, he entered the land involved in the action at the United States land office in Boonville, Mo., and that in pursuance of said entry there was duly issued to him by the United States Government and proper officers thereof a patent for said land, dated the 20th day of April, 1871, and delivered to plaintiff, and that by virtue of the same he brings this action and claims possession of said land.

He admits that about the time stated in said answer said Wm. R. Kemp applied to the land office of the United States at Clinton, Mo., to enter and did enter certain land with and by virtue of said bounty-land warrant No. 1384, but he denies that said Kemp ever applied to enter or did enter the land here sued for, or that he
17 got any duplicate receipt or certificate evidencing that he did.

Pl'ff admits that on the 1st of June, 1850, there was issued by the United State- Government and its proper officers a patent to said Wm. R. Kemp for the lands so enter- by him with said land warrants, to wit, the S. E. ¼ S. E. ¼ sec. 14 and N. E. ¼ N. E. ¼ sec. 23 and W. ½ N. W. ¼ 25, all in township 47, range 21, which, together with that involved in this suit, was at the time of said entry vacant and of the public domain of said United States and subject to such entry; but plaintiffs says in very truth and fact the said land last above described is the land and only land which said Wm. R. Kemp applied to enter and did enter with said warrant, and is the same and only land which was entered by said officers at said land office on the books of the said office as so entered by him, and was also described in the said duplicate receipt or certificate so given to him, and also in the reports of said officers of said land office, both to the United States and the State of Missouri, and says said Wm. R. Kemp and those holding under him never had any legal or equitable claim to the land sued for in this case, and if they or any of them ever did occupy the same before the entry of same by pl'ff, which pl'ff does not admit, pl'ff says they did so without any legal or equitable right therefor & can
18 claim no advantage here therefor.

And pl'ff denies that any of said parties have made on said land lasting and valuable improvements, and pl'ff admits that since the death of said Wm. T. Kemp the said widow, Martha J. Kemp, has claimed to control the said land by virtue of her being the widow of said Wm. T. Kemp and the mother of said children, who are infants, and that she has been renting the same out and was so renting it at the commencement of this suit; but the plaintiff says said occupation was and is, under the circumstances and for the purpose of this action, joint, so far as pl'ff & this action is concerned. Pl'ff denies that he entered said land or procured his patent therefore with knowledge or notice of any of the facts set up in said answer as a defence herein or with any notice that said land was not properly of the public domain and subject to such entry; and pl'ff says the same was in fact of such public domain, and pl'ff entered and procured his patent to the sam- in the utmost good faith and as he ha- a legal and equitable right to do; and plaintiff denies each and every allegation in said answer not herein otherwise admitted, and further says many of said allegations are immaterial to the matter in issue in this case, and some of them are simply false and slanderous.

Wherefore plaintiff still prays judgment as in his petition.

19 And, further replying, pl'ff says, even if the errors set out in said answer were committed and said facts were true, there was full and ample provisions made by the acts of the Congress of

the United States whereby to correct the same, and the same can only be corrected under and as pointed out by said acts of Congress and not by this court.

That there is no power or jurisdiction in this court to inquire into the matter stated in the said answer, or to give the relief sought thereby; and even if said facts were true, the def'ts and those under whom they claim having rested for more than 30 years and until the rights of pl'ff, by virtue of his entry and purchase of said land, have intervened and taken no steps to correct the same, equity will not now lend its aid to them to grant the relief prayed for; and plaintiff says no cause of action, by virtue of the matters stated in said answer, accrued to def'ts or those under whom they claim, nor did any right of action or defence or *grown* for relief herein accrue to or vest in def't- or those under whom they hold within ten years next before the commens-ment of this action, and said defence is barred by the statute of limitation, and pl'ff pleads the same.

20 And pl'ff says no cause of action, by virtue of the matters stated in said answer, accrued to def'ts or those under whom they hold, nor did any right of action or defence or groun- of relief herein accrue to or vest in def'ts or those under whom they hold within twenty years next before the commens-ment of this action, and said defence is barred by limitation, and plaintiff now pleads the same.

Wherefore pl'ff still prays judgement as in his petition.

And as to that part of said answer wherein the statute of limitation is set up and pleaded and relied on as a defence to this action, plaintiff says the real estate here sued for is not and never was in the lawful possession of the defendants *as* those under whom they claim or any of them; and, further, pl'ff has paid taxes on said land after the date of his said entry of the same and before the bringing of this suit, and before said entry by plaintiff said land was not subject to taxation.

And plaintiff denies that the equitable title to said land ever emanated from said Government till said entry by pl'ff, and if it did it is not material in this action; and for other and further reply to said last-mentioned part of said answer plaintiff states that on

21 the 14th day of April, 1873, he duly commenced an action in the circuit court of Pettis Co., Mo., against said Wm. T. Kemp, who was then in possession of said real estate here sued for to recover the same, which suit was pending at the time of the death of said Kemp, and was at the Sept. term, 1875, removed in due course to the United States circuit court of the western district of Missouri, and in which said cause this pl'ff suffered a nonsuit in said last named court on Nov. 23d, 1877.

That on the 13th day of August, 1877, this plaintiff commensed an action in said circuit court of Pettis Co., Mo., against these def'ts, the widow and heirs of said Wm. T. Kemp, to recover possession of said land, in which said cause pl'ff suffered a nonsuit in said court at the May term, 1880, on the — day of May, 1880.

And this action was begun on the 13th day of August, 1879, and

is not barred by the statute of limitation or any statute or thing whatever.

Wherefore plaintiff still prays judgement as in his petition.

SMITH & SHIRK,
Pl'ff's Att'ys.

22 And afterwards, to wit, on the 6th day of January, 1881, it being the fourth day of the January term, 1881, of said court, the following further proceedings were had in said cause, to wit:

Rec'd Entry # 4. Jury Waived & Cause Submitted.

WM. SENSENDERFER
vs.
SAMUEL A. KEMP *et al.*

Now, at this day, come parties, by their respective attorneys, and this cause being ready for trial and a jury being waived, the same is taken up and submitted to the court, and, there not being sufficient time to close the evidence, this cause is continued until to-morrow morning.

And afterwards, to wit, on the 7th day of January, 1881, it being the fifth day of the January term of this court, the following further proceedings were had in said cause, to wit:

Rec'd Entry # 5. Cause Resumed.

WM. SENSENDERFER
vs
SAMUEL A. KEMP *et al.*

Now, at this day, come the parties hereto, by their respective attorneys, and this cause is resumed for trial, an-, there not being
23 sufficient time to close the evidence, this cause is continued till to-morrow morning.

And afterwards, to wit, on the 8th day of January, 1881, it being the sixth day of the January term, 1881, of this court, the following further proceedings were had in said cause, to wit:

Rec'd Entry # 6. Resumed.

WM. SENSENDERFER
vs.
SAMUEL A. KEMP *et al.*

Now, at this day, come the parties hereto, by their respective attorneys, and this cause is resumed for trial, and, the evidence being closed and there not being sufficient time to close the trial of this cause, the same is continued till Tuesday, January 11, 1881.

And afterward, to wit, on the 11th day of January, 1881, it being the eighth day of the January term, 1881, of this court, the following further proceedings were had in said cause, to wit:

Rec'd Entry # 7. Resumed.

WM. SENSENDERFER
vs.
SAMUEL A. KEMP *et al.*

Now, at this day, come the parties, by their respective attorneys, and this cause is resumed for trial, and, there not being sufficient time to close the argument of this cause, the same is
24 continued till to-morrow.

And afterwards, to wit, on the 12th day of January, 1881, it being the ninth day of the January term, 1881, of this court, the following further proceedings were had in said cause, to wit:

Rec'd Entry # 8. Resumed.

WM. SENSENDERFER
vs.
SAMUEL A. KEMP *et al.*

Now, at this day, come the parties hereto, by their respective attorneys, and this cause is resumed for trial, and, the argument not being concluded, the same is continued till to-morrow.

And afterwards, to wit, on the 13th day of January, 1881, it being the tenth day of the January term, 1881, of this court, the following further proceedings were had in said cause, to wit:

Rec'd Entry # 9. Cause under Advisement.

WM. SENSENDERFER
vs.
SAMUEL A. KEMP *et al.*

Now, at this day, come the parties hereto, by their respective
25 attorneys, and this cause is resumed for trial, and, the argument of counsel having been concluded and the court not being fully advised in the premises, takes said cause under advisement.

And afterwards, to wit, on the 21st day of January, 1881, it being the sixteenth day of the January term, 1881, of this court, the following further proceedings were had in said cause, to wit:

Rec'd Entry # 10. Finding and Judgment of the Court.

WILLIAM SENSENDERFER
vs.
SAMUEL A. KEMP, MARTHA J. KEMP, JAMES W. KEMP, IDA BELLE KEMP, R. H. PAYNE, THOMAS WASSON, Jr., JOHN W. PAYNE, Jr., and J. T. HEDGES.

Now, on this day, this cause again coming on for hearing and for the decision of the court, and the court, having heard the evidence and the argument of counsel, and being fully advised in the premises, and having duly considered the same, doth find that on June 13th, 1848, one Wm. Riley Kemp located a land warrant issued under the act of Congress of February 11th, 1847, upon and
26 entered at the district U. S. land office at Clinton, Mo., the following-described tract of land in Pettis county, Mo., to wit: The west half of the northwest quarter of section twenty-four (24), in township — (47) and range twenty-one (21), and received from the officers of the land office a certificate evidencing the location and entry thereof; that thereupon said Wm. R. Kemp took possession of said land, and that said land has from that time ever since remained continuously in the open and notorious possession of Wm. R. Kemp and those holding under him, who from time to time have made lasting and valuable improvements thereon; that in the year 1869 one Wm. T. Kemp became the owner and went into possession of said land, and that in October, 1874, said Wm. T. Kemp died, leaving as his widow the defendant, Martha J. Kemp, and his children, the defendants, Ida Belle Kemp, Samuel A. Kemp, and James W. Kemp, and also another child, not made a defendant herein, to wit, Wm. R. Kemp, and that since the death of said Wm. T. Kemp said widow and heirs have been in possession of said land; and the court further finds that by the said location and entry of said land by said Wm. R. Kemp the equitable title of said land passed from the United States to said Wm. R. Kemp, and that said equitable title is now held and owned by said widow and heirs of Wm. T. Kemp, deceased.

27 And the court further finds that at the time of locating said bounty land warrant on said land, in June, 1848, by the said Wm. Riley Kemp, he did not fill out the application for such location himself, but signed the same in blank and so delivered it to the officers of the district land office, who afterwards filled up the same, and in so doing, through mistake, inserted therein section 25 instead of section 24, and thus erroneously certified said location to the General Land Office at Washington city as being in section 25 instead of section 24.

And the court further finds that in December, 1870, the plaintiff attempted to procure the title to said land from the United States, and for that purpose located a bounty land warrant, issued under the act of Congress of September 28th, 1850, upon said land, at the district land office at Boonville, Missouri, and afterwards, on April

21st, 1871, procured from the U. S. a patent for said west half of the northwest quarter of section 24, township 47, range 21.

And the court finds that at the time of making said location and at the time of procuring said patent the plaintiff had notice of the claim of said Wm. T. Kemp to said land, and had notice of the entry and location made by said Wm. Rily Kemp and of the said mistake made by the officers of the land office concerning said entry and location, and with notice of the fact that the equitable title to
28 said land had passed from the U. S. to said Wm. R. Kemp, and was then held and owned by said Wm. T. Kemp.

Wherefore the court doth find that said plaintiff acquired and held the legal title to said land as a trustee for the said Wm. T. Kemp.

And the court, not making any finding or decision upon the question of the statutes of limitations pleading by the defendants, doth order, adjudge, and decree that the plaintiff be, and he is hereby, declared to be a trustee, holding the legal title to said land under said patent therefor issued to him from the U. S. in trust for the said widow and heirs of said Wm. T. Kemp.

And the court doth order, adjudge, and decree that the legal title to said land, to wit, the west half of the northwest quarter of section 24, township 47, range 21, in Pettis county, Mo., be, and the same is hereby, divested out of said plaintiff, Wm. Sensenderfer, and the same is vested in the said Martha J. Kemp, widow, and in the said Ida Belle Kemp, Samuel A. Kemp, James W. Kemp, and Wm. R. Kemp, heirs, of said Wm. T. Kemp, deceased, to have and to hold the same in proportion and according — their respective rights and interest as inherited from said Wm. T. Kemp, deceased.

And it is further ordered, adjudged, and decreed that the defendants have and recover of the plaintiff their costs in this behalf expended, and that execution issue therefor.

29 And afterwards, to wit, on the 24th day of January, 1881, it being the eighteenth day of the January term, 1881, of this court, the following further proceedings were had in said cause, to wit:

Rec'd Entry # 11. Motion for New Trial Filed.

WM. SENSENDERFER }
vs.
SAMUEL A. KEMP *et al.* }

Now, at this day, comes the plaintiff, by his attorneys, — files a motion for a new trial herein.

And afterwards, to wit, on the 26th day of January, 1881, it being the twentieth day of the January term, 1881, of this court, the following further proceedings were had in said cause, to wit:

Rec'd Entry # 12. Motion in Arrest Filed.

WM. SENSENDERFER
vs.
SAMUEL A. KEMP *et al.*

Now, at this day, comes the plaintiff, by his attorneys, and files his motion in arrest of judgement.

30 And afterwards, to wit, on the 28th day of January, 1881, it being the twenty-second day of the January term, 1881, of this court, the following further proceedings were — in said cause, to wit:

Rec'd Entry # 13. Motion for New Trial Overruled. Pl'ff Excepts.

WM. SENSENDERFER
vs.
SAMUEL A. KEMP, MARTHA J. KEMP, JAMES W. KEMP, IDA BELLE KEMP, R. H. Payne, Thomas Wasson, Jr., John W. Payne, Jr., and J. T. Hedges.

Now, at this day, come the parties hereto, by their respective attorneys, and the plaintiff now files affidavits in support of the motion for a new trial, and said motion being now taken up and submitted to the court for final hearing, and the court, having seen and heard the same and being fully advised in the premises, overrules said motion for a new trial; to which action of the court in *our* overruling said motion plaintiff then and there at the time duly excepted.

Mo. in Arrest Overruled. Pl'ff Excepts & Files Bill of Exceptions. Affidavit & Bond for Appeal Filed, Approved, & Appeal Granted.

And the motion in arrest of judgment heretofore filed by plaintiff being now taken up and submitted to the court, and the
31 court, having seen and heard the same and being fully advised in the premises, overruling said motion, plaintiff then and there at *at* the time duly excepted; and now plaintiff presents his bill of exceptions herein, which is by the court filed and signed, and plaintiff now files his affidavit for appeal and his appeal bond, which said bond is by the court approved and an appeal is by the court granted herein to the supreme court of the State of Missouri and a supersedeas is by the court allowed; which said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

In the Circuit Court within and for the county of Pettis and State of Missouri. January Term, A. D. 1881.

WILLIAM SENSENDERFER, Plaintiff,
against
SAMUEL A. KEMP, MARTHA J. KEMP, JAMES W. KEMP, IDA BELLE KEMP, R. H. Payne, Thomas Wasson, Jr., John W. Payne,
32 Jr., and J. T. Hedges, Defendants.

Be it remmembered that on the trial of this cause the following proceedings were had:

The plaintiff, to sustain the issues on his part, offered evidence as follows:

A patent from the United States of America to William Sensenderfer for the land in controversy, dates April 20th, 1871, which is in words and figures as follows:

Sensenderfer Patent.

The United States of America to all — whom these presents shall come, Greeting:

Whereas, in pursuance of the act of Congress approved September 28th, 1850, entitled "An act granting bounty land to certain officers and soldiers who have been engaged in the military service of the United States," warrant No. 16907, for 80 acres, issued in favor of John Harris, private in Captain Willis' company, 2nd regiment Tennessee militia, War of 1812, having been signed by Obadiah Harris, administrator of the estate of the said John Harris, deceased, to Albert C. Widdicombe, by order of the probate court of Cooper county, Missouri, and by him to William Sensenderfer, & has
33 been returned to the General Land Office, with evidence that the same has been duly located upon the west half of the northwest quarter of section twenty-four, in township forty-seven, of range twenty-one, in the district of lands subject to sale at Boonville, Missouri, containing eighty acres, according to the official plat of the survey of the said land return- to the General Land Office by the surveyor general:

Now, know ye that there is therefore granted by the United States unto said William Sensenderfer the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said William Sensenderfer and to his heirs and assignes forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the
[SEAL.] twentieth day of April, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-fifth.

By the President:

U. S. GRANT,
34 By J. PARRISH, *Secretary.*

M. GRANGER,
Recorder of the General Land Office.

Recorder's Certificate of Record of Sensenderfer Patent.

STATE OF MISSOURI, }
County of Pettis, } ss:

I, J. D. Crawford, recorder of deeds within and for the county of Pettis and State aforesaid, do hereby certify that the above and foregoing instrument of writing was filed for record in my office on the 11th day of May, A. D. 1871, at — o'clock — m. — m., and has been duly recorded in Deed Record T, on page 33.

Witness my hand and official seal, at office, in Sedalia,
[SEAL.] Pettis county, Missouri, the day and year aforesaid.

J. D. CRAWFORD, *Recorder.*

Testimony of C. W. Fristoe for Plaintiff.

C. W. FRISTOE, of lawful age, being produced, sworn, and examined on the part of the plaintiff, testified as follows: I reside nine miles north of Sedalia. I know the land in controversy; live with- 1¾ miles of this land; lived there since 1833. I am a farmer. In August, 1879, Mrs. Martha J. Kemp, the widow of William T. Kemp and her children were in possession and control of this land
35 The children are all minors. R. H. Payne, Thomas Wasson, Jr., Berry Greer, Jr., John W. Payne all cultivated a part of this land. I saw them at work there. Mrs. Martha Kemp does not live on the land. There is no house on it. W. T. Kemp had a house burnt down on this land a year or two before he died. He controlled the land before he died, in 1874. I know its rental value; it is worth two dollars per acre cash rent, and it has been worth that since 1879. In 1875, '6, '7, & '8 it was worth $2.00 per acre cash rent.

Cross-examined by defendants' counsel, said witness testified as follows:

The men I mentioned were raising crops there. I know nothing about their contract. I never saw anything done *their* except ploughing and sowing in the spring. I think some of the parties are still *their*. *Their* is no house on it and no one living on it. I have no personal knowledge of Mrs. Kemp controlling it. I know the children; they are all small children. I have never seen them on the

place since *since* the house was burnt. The house was burnt in the fall of 1874. If W. T. Kemp died in the fall of 1874 the house was burnt in the spring or winter proceeding. It is very fair
36 land—high, rolling prairie. I have known it since I was a child. Riley Kemp had possession of the land ever since he entered or claimed to have entered it. He claimed to own it. I left home in 1850 and came back in 1854. When I went away there was none of it in cultivation, but when I came back part of it was in cultivation. He claimed to have entered it prior to 1850 and claimed title to it ever since I was a boy, and to the 160 acres or the whole tract. The north forty of this eighty was enclosed in 1854 and was still held by W. R. Kemp. I knew of the deed of trust he gave on this land. Old man Billy Kemp bought the land under this deed of trust. He went into possession and claimed the land until he sold it to Cummings. Everybody knew the land as his. He was in possession and controlled it. The north forty was in cultivation, but I don't think the south forty was. He fenced the south forty some time after the war. Cummings got the land of Billy Kemp some time after the war. I think it was in 1867 or 1868. He never moved on the land. He cultivated it and claimed it, and was recognized by everybody as the owner of it. He sold to Wm.
37 T. Kemp about 1869 or 1870. He moved on the land and built a house on it some time in 1869 or 1870. He may have bought it in the spring and built in the fall. He lived there until the house burnt down. He claimed it and everybody recognized it as his. It was a matter of public notoriety. It was generally known in the neighborhood that Riley Kemp had entered this land I have heard that Riley Kemp died en route to Oregon. He was gone when I came back. He never came back.

Questions by defendants' counsel. State if it was not generally reported in the neighborhood that he died on his road to Oregon.

To which question plaintiff's counsel objects, for the reason that general reputation was not the best evidence as to what became of said Riley Kemp, because the same was secondary, and it was not shown that better evidence could not be procured; which objection was by the court overruled; to which ruling of the court the plaintiff then and there duly except- at the time.

Whereupon said witness said: Yes; it was the general understanding that he died on his way over there. The general understanding in the neighborhood was that he died on his way to Oregon.

38 Re-examined by plaintiff's counsel:

Riley Kemp entered other lands besides this 160-acre tract; he entered 80 acres of timber two miles from the one hundred and sixty acre tract; he entered timber land first in section 36. He lived on the Parrott place when he left; this was in section 24; think that William Kemp finished fencing this 80 acres of — by itself just before he sold to Cummings, in 1867 or 1868. Bradley, Wasson, Payne, and the other defendants, except Hedges, cultivated this land in 1880.

And this was all the evidence offered by plaintiff at this time.

The defendants, to sustain the issues on their part, offered evidence as follows:

Testimony of James T. Kemp for Defendants.

JAMES T. KEMP, of lawful age, being produced, sworn, and examined on the part of the defendants, testifies as follows:

I live eleven miles northeast of Sedalia. I knew W. T. Kemp in his lifetime. I am administrator of his estate; never found among his papers any certificate of entry for the land in controversy; they were not among his papers. I live about 4 miles from the land. He was my cousin. He died in November, 1874. He was living with me when he died.

39 He left the land in the fall of 1873, when the house burnt. He rented it out after his house burnt as long as he lived. I have know- the land ever since I was a boy. I helped to breake one forty of it when I was a boy, in 1848 or 1849. I am 46 years old. W. R. Kemp claimed it then. He fenced it. He gave us the use of all we broke one season for breaking. He claimed to own 160 acres. My recollection is that it was reported and generally understood that he had entered this land. The fact was notorious over the country. He started for Oregon in 1850. I don't know whether he took his papers or not. We got letter- frequently from the family telling of his death on his way. I met his only son in Montana in 1866, and he told me all the particulars of his father dying.

To which said evidence the plaintiff, by his counsel, then & there objected at the time for the reason that such letters *is* the best evidence of their contents, because parties who were present at the death of W. R. Kemp were the best witnesses to testify concerning that matter, and because all of said evidence is secondary and he-re-say; which objections were by the court overruled; whereupon plaintiff then and there duly excepted at the time.

40 He never sent back any of his title papers. Uncle Billy Kemp wrote for them and they were reported lost. Wm. Kemp next got the land. He fenced the south forty and sold it to Cummings. It was about the year 1853 when William Kemp got the land. I don't know what was done with the land between the time when W. R. Kemp left and William Kemp got it. I think the other eighty of this 160-acre tract laid north and east of the 80 acres in controversy; that one forty lay due east and the other forty lay due north of that, the east eighty being furthest north. All of the other eighty was fenced. The whole 160 acres was enclosed when Cummings bought this 80. He cultivated it a year or two and sold it to W. T. Kemp. Cummings built a shed on the north forty. When W. T. Kemp got the land he built a house on it, and moved on the land. The house burned down in 1873. He moved on the land in 1869 or 1870. It was always know- as the Kemp

and Cummings land while they owned it. These parties were in possession of this land, claiming to be the owner- of it; never heard their claim disputed or of any one claiming the land until
41 Mr. Sensenderfer laid claim to it.

Said witness, being cross-examined by plaintiff's counsel, testified as follows:

JAS. T. KEMP cross-examined by plaintiff:

I am 46 years old now. I have recollection of his entering the land. I was a boy when—I was from 7 to 10 years old when he fenced the north forty. He fenced the north forty and gave us what we could make out of it. I think this was *was* the first fence on the 160 acres. I was a boy when my brother and I broke the land. He was older than me. He held the plough and I drove. Riley Kemp went to Oregon in 1850 or 1851, and this land was fenced a year or two before he left. I think the forty fenced is the north forty of the 80 in dispute. There was no other field adjoining it. It was fenced when we ploughed it. I think this was the first fence put on any of it. If the other eighty was improved first, then the fence I refer to was on that part of it. Wm. Kemp exercised ownership over this 80 until he sold to Cummings. He fenced the south forty awhile before he sold to Cummings. Cummings, I think, was the first one to cultivate the south forty. The south forty was in pasture some years before it was plowed.

42 *Martha J. Kemp'- Testimony for Defendants.*

Mrs. MARTHA J. KEMP, one of the defendants, being duly sworn, testified as follows:

I am the widow of *of* W. T. Kemp, deceased. He died October 31st, 1874. He lived at the time of his death at the Buck Kemp place. He moved there in March. We moved there in '73. We were living on the land in controversy at the time we were burnt out, in October, 1873. We moved there in April, 1869. During all that time my husband claimed the land. He bought the land and built a house in January, 1869. He still claimed it after the fire. He had some of it in wheat that year and rented some of it next spring for corn. Ida, Samuel, and James W. Kemp are my children. I have another child named William R. Kemp, who is not made a party to this suit. Samuel is twelve years old; Ida, ten; James, nine, and William R., seven. They have all been living with me since my husband's death. They have not been living on the land since my husband's death. I rented it out to various parties. R. H. Payne had a part in 1879, Thomas Wasson, Jr., had a part, J. H. Payne had a part, Berry Greer had a part, Simeon Payne a part, James Wasson a part; all had separate and distinct parts, and were not interested in each other's tracts.
43 I made separate renting and contracts with each of them. I did not know the land prior to the time my husband bought

it. I could not find among my husband's papers any certificate of entry from the Government of the U. S. to W. R. Kemp; couldn't find the deed of trust to Walker; couldn't find the deed from Kemp to Cummings nor from Cummings to Kemp. We examined and searched for these papers frequently. My husband paid the taxes on the land while he owned it.

To the admission of which said evidence plaintiff, by his counsel, objected for the reason that such evidence was secondary and the loss of the tax receipts accounted for; which objection was by the court overruled; to which action of the court the plaintiff then and there at that time duly *accepted*.

Objected to by —— ——. Objection overrules. Pl't'ff except.

MARTHA J. KEMP continued:

I gave three tax receipts to Col. Philips. Uncle Jimmy Kemp paid the taxes while Mr. Cummings owned it.

To which evidence plaintiff duly objected for the reason that the same is secondary; which objection was by the court overruled; whereupon plaintiff then and there duly *accepted* at the time.

Pl't'ff objected. Objection overruled. Pl't'ff excepted.

Said witness, being examined by the plaintiff's counsel, testified as follows:

44 Cross-examination of MARTHA J. KEMP by pl't'ff:

I never paid any taxes on the land. Those receipts I gave Col. Philips were on this land. All I know about Uncle Jimmy Kemp's paying the taxes was what Col. Philips told me. Uncle Jimmy Kemp was William Kemp's administrator. I know the receipts I gave Col. Philips call for this land, because I compared them with the deed. I took charge of this land after my husband's death; rented it out to various parties since then from year to year in different parcels to different parties. John Payne and Hedges were not in possession in 1880, but the other defendants were, and were occupying it in 1879. This has been condition of land since my husband's death.

Redirect Examination.

Redirect examination by def'ts:

I am guardian of the children by appointment of the court.

Testimony of B. L. Greer for Def'ts.

BENJ. L. GREER, of lawful age, being produced, sworn, and examined on the part of defendants, testified as follows:

I reside on the Arron Rock road, ten miles north of Sedalia. I know the eighty acres of land in controversy; have know- it since

1838; live within a mile of it. I knew the land when it was Government land. W. R. Kemp first took possession of it.

He took possession of 160 acres. It adjoined —. Every-
45 body knew he had possession and claimed ownership of it. I don't know how long he remaided in possession. He started to Oregon and died en route. After him Wm. Kemp claimed it.

The first I remember about its being in cultivation was when Cummings got it. He had it awhile, and then W. T. Kemp bought it and built a house and lived in it until it burnt down. I reccollect the circumstances of W. R. Kemp's taking possession and claiming to have entered the land. There were two or three years intervened between the time he claimed to have entered it. When he started to Oregon he wanted me to enter a piece adjoining the Parrot land. I don't know the number of the Parrot land. The land I entered is half a mile south of the land in question. The land described in the patent shown me is the land I entered—that is, the N. W. ¼ of the N. W. ¼ of section 25, t'p 47, range 21. He requested me to enter this land. I went to the land office at Clinton. When I got there I made application to enter the land, got a receipt, took it to the register; there was nothing said about the land being entered. I paid the money and got the duplicate.

Cross-examin*at*ed by plaintiff's counsel, — testified as follows:

46 Cross-examination of B. L. Greer by pl't'ff:

I don't know what the books at the land office showed. I diden't examine the books myself. I got the numbers from some of the Kemps; think it was James or William R. Kemp; don't know how they got the numbers. I knew the register, but don't now know who was register. Riley Kemp asked me to enter it for myself. It was south of the Parrot forty. The Parrot forty did not join the land in dispute. It missed it one-fourth of a mile and adjoins that I entered. Riley Kemp told me that he had two warrants; that he laid one in the prairie and one in the timber, one-half of a mile apart. The timber is south of the other entry. He entered 160 in the timber and 160 in the prairie.

Testimony of Simeon Payne for Def't.

SIMEON PAYNE, of lawful age, produced, sworn, and examined on the part of the defendants, testified as follows:

I reside ten miles northeast of Sedalia. I came there in the fall of 1850, and I know the land in controversy. My land joins it on two sides. I be- acquainted with the land in the fall of 1850, Mr. Riley Kemp claiming it then. He took me over the land. He showed me 160 acres in the prairie and 160 acres in the timber.

47 The prairie land is in section- 14, 23, and 24. The south 40 of the west 80 was west of the north 40 of the east 80. It

lapped a quarter of a mile. There were 40 acres in the southeast corners of section 14, forty acres in the northeast corner of section 23. These made the west eighty; and the east eighty lay in the west half of northwest quarter of section 24.

Platt, here shown witness, who testified that the land laid in the shape as shown on the plat. In the fall of 1858 the part in section 14 was fenced. The rest of the land had no improvements on it. I lived adjoining it and within seventy yards of the southeast corner since 1851. All the country spoke of this land as being W. R. Kemp's. He left it in the spring of 1851 or 1852. I think it was the next spring after I came to the country. It was reported that W. R. Kemp died on his way to Oregon. Wm. Kemp next claimed the land. He bought under the Wood and Walker mortgage. I don't remember the date of the sale under the mortgage. It was only a short time after I came to the country. It was generally known that under this sale, under this mortgage Wm. Kemp bought, he went into possession, used, and claimed it as his own.

48 It was a matter of notoriety much talked of in the neighborhood. In about 1859 or 1860 he fenced the land in controversy. None of this eighty was enclosed prior to this time, and I think that the whole of the eighty was enclosed at one time; don't think the north forty was first *was first* enclosed. He enclosed the whole eighty in 1859 or 1860, and used the north forty as til-able land and the south forty as pasture. He remained in possession until he sold to Cummings. When Cummings bought he went into possession and broke up the south forty and put in cultivation. He didn't live on the land. His purchase and possession was a public notoriety. He built a little box house on the north forty which he used to put his gears in. He lived two miles away on Pinhook. He sold to W. T. Kemp, who took possession and built on it and lived on it until the house burnt down; then he moved off about two miles away. Part of the land he then cultivated and rented out the balance. Up to the time of his death it was a public notoriety that he owned and claimed this land. I entered forty acres in the neighborhood some one to three years after I went there.

Buck Powell entered it for me. Mr. W. R. Kemp told me that this land was vacant before he went away; that was in section 25.

49 It was the south 40 of the west half of the northwest quarter of section 25. My forty was just south of Greer's 40. It was a mile south of the land in controversy. (Platt here shown witness, on which he designates the piece he entered as the southwest of the N. W. of section 25, and said that he entered it after Riley Kemp left.)

Cross-examination:

Cross-examinated by plaintiff's counsel, — testified as follows:

W. R. Kemp left for Oregon shortly after he told me the forty was vacant. I think I entered it two or three years after he told me it was not entered. I know that he told me this when we were

walking over his land. He was showing me his entries; he showed me another vacant forty in section twenty-three. Mr. Kemp entered it and sold it to Mr. Gorrel. This is the S. E. N. E. 23. Gorrell and — swapped and I got it. He also told me of another vacant forty which Greer enter- — was vacant. He didn't call the number of the land, but just said, Here's a forty vacant and there's a forty, pointing out the lines. He went around and showed me the lines. I learned the number of other- when I first came
50 here. I can remember numbers of lands on the corners of section-, but not inside. I got bothered. I can't do it now without a plat. I own the forty south of the land in controversy, and we made a fence arrangement together and built a fence in partnership. This fence is on the north side of the 40 south of the 80 in dispute. I now own the forty west of the south forty in controversy, but did not own it when the eighty was enclosed. The forty immediately south of the eighty in dispute had a fence on the north side when I came to the country.

Defendants here offered and read the deposition of James Kemp, which is as follows:

Deposition of James Kemp on Part of Def'ts.

JAMES KEMP, Sr., of lawful age, being produced, sworn, and examined on the part of the defendants, deposeth and saith:

My name is James Kemp; I am going on 78 years of age; I live in Pettis county, about 1½ miles northwest of La Monte; I can't stand up or walk, and am compelled to move about in a chair on account *on account* of paralysis, and have been so for one year and a half, and will not, in my opinion, be able to attend court in Sedalia at the next term. William Riley Kemp was a cousin of mine, and we were raised in the same neigborhood.
51 He lived in Pettis county, near Pinhook or Muddy Mill, in N. E. part of county. He left this county in 1851 or 1852 and started for Oregon. I don't know what became of him. The report came back that he died on the way. His family went with him, and letter- were rec'd from the family giving information of his death. He had two brothers-in-law and several neighbors who went in the same party, and the report came from these parties also that he was dead. One of his daughters has been to Pettis county since then. She brought the report also that he had died on the way out. It was a matter of notoriety among his relations and friends in this county that he had died as above stated. I do not know what became of his papers that he took with him. W. R. Kemp claimed to have entered 160 acres of land with a land warrant, the number of which I cannot now state. It was in the northeast part of the county—t'w'p 47, range 21. He owned two forties which had been entered by L. Parrott, and also 160 which he claimed to have entered himself. I will not be positive about the amount; he may have had some land besides this. The land was not in a square; each 80 laid north and south and lapped each

other a quarter. My recollection is that the west 80 extended
52 *fatherest* north. I can't state the exact time that he claimed he had entered it; I think it was about three years before he went away. He fenced one 40 and broke all or a part of it and sowed a crop of wheat on it and afterwards raised one or two crops of corn on it. If I remember correctly, that was the north 40 of the W. 80. I lived about a half mile from S. E. cor. of this 160 for several years before and after he entered this land. I moved here in '51 or '52, shortly after he left for Oregon. I lived in that neighborhood from 1832 up to the time I moved here, except when I went back to Va. I remained there from 1833 to '35—about two years. I have been acquainted with the land and the people in the neighborhood of the 160-acre tract; I have a large connection there and have been in the habit of visiting there since I lived there. I was sheriff of and tax collector of Pettis county for two terms, from 1848 to 1852. The above 160 acres of land was known in the neighborhood as William R. Kemp's land; it was spoken of as his land in the neighborhood. Wm. R. Kemp claimed the land and called it his
53 own. It was the general "chat" that he had given a mortgage or a deed of trust on this land to Walker or Maston. The land was sold under the mortgage or trust deed after William R. Kemp left. I bid the land in at that sale for my brother, William Kemp. After that sale William Kemp claimed this land. After the sale it was generally known and spoken of as William Kemp's land. William Kemp sold the east 80 of this land to W. D. Commons. I think while Wm. Kemp owned it he fenced the north 40 of the east 80. The whole eighty may have been fenced; the north 40 put in cultivation and the south 40 pastured. It was enclosed two or three years before Commons bought it. Commons cultivated the whole eighty for 2 or 3 years and sold it to Wm. T. Kemp, the son of my brother, Wm. Kemp. William T. Kemp died about six years ago. Wm. Kemp, my brother, died some time between 1865 & 1870. I was his adm'r; as such I took charge of his papers; among his papers I found a number of tax receipts upon his lands. (Witness produced two tax receipts, which are hereto attached and marked Exhibit "A" and "B.") I found these two tax receipts among his papers when I took charge of his estate. (Witness here pro-
54 duced another tax receipt, hereto attached and marked Exhibit "C.") I think I paid this tax myself after I became adm'r. The land mentioned in Exhibit "C" is the land that Wm. Kemp sold to W. D. Cummons, and is also part of the land before mentioned in this deposition as having been entered by Wm. R. Kemp. I don't know anything about plaintiff entering this land, except what has been told me. A man named Widdicombe has been here twice to see me about a certain 80 acres of land, which I suppose to be the land in controversy in this suit. I didn't know his given name. I can't state the date when he came to see me. I suppose it was a short time before the suit was brought or a short time before the land was entered. I don't remember the dates. The 2nd visit was made about the middle of the winter; I think in extreme cold weather. First visit was in the spring or fall; I don't remem-

ber which. I don't know where Widdicombe lives. He was around soliciting to get land patents for parties who hadn't yet obtained them. He told me on the first visit that the books at the land office showed that a certain 80 acres of land in this county was not marked as having been entered, and that *it* had been to the recorder's office in Pettis
55 county and found the land in Wm. Kemp's name; he found that Wm. Kemp was dead and that I was his adm'r, and he then inquired for me and came to me. I told him that the land did not then belong to my brother's estate; that my brother, Wm. Kemp, had sold it to W. D. Cummons and he had sold it to Wm. T. Kemp. He then asked me if I knew if any patents had been obtained; and, if so, where they were. I told him I knew nothing about the patents; that the land had been entered by Wm. R. Kemp, as I had understood, and he told me he would give me time to go among the connection and see if I could hear of or find any patent, and if no patent was found the land would be entered shortly. He didn't state at that time who would enter it. I did not say anything to him about improvements on the above land, as I recollect. I think I told him that Wm. T. Kemp was then living on the land. I don't remember that anything further was said in regard to the land at that time. I don't remember how long it was between the two visits. On the second visit he asked me if I had found any patents. I told him I had not; he then told me the land was entered. I asked him
56 by whom, and he didn't give me the man's name, as I recollect, but told me that it was a Dutchman. I asked him where he lived; he told me he lived down about St. Louis. In the first conversation I had with Widdicombe I told him that William R. Kemp had entered 160 acres of land. We were standing near the corn-crib, and I marked off the land for him and showed him how the two eighties lapped.

Cross-ex. of Jas. Kemp, Sr., by pl'tff:

On being cross-examined by S. P. Sparks for plaintiff, — testified as follows:

Ques. Then I understand you to say all you know about the claim of Wm. R. Kemp to the land in controversy is what you have heard?

Ans. That is all. I never saw any duplicate for it. I heard him say he owned and entered the land, and it was the general chat besides.

Ques. Had Wm. R. Kemp prior to leaving this State for Oregon made any improvements of any character on the particular tract in controversy?

Ans. I don't think he had.

Ques. What is your best recollection as to the space of time which elapsed between the two visits of Widdicombe?

Ans. It must have been from 3 to 5 months between the first and second visit.

Ques. State if you can the year Widdicombe made the first visit.

57 Ans. It is impossible for me to state; can't answer with any certainty. It was before the land was entered, though it might have been entered when he made the first visit; can't say. His first visit was not a great while before the first suit was brought.

—. Do you know that Widdicombe had seen the land at the time of either of his visits?

Ans. I do not.

Ques. When were the improvements first put on the land about which you testified, and by whom?

Ans. I don't remember date that the tract was enclosed, but it was done during the time Wm. Kemp was claiming ownership of it.

Ques. What is the character of this land as to soil and even-ess of surface?

Ans. Soil very good and lies very well.

Ques. What is the rental value of land of such character?

Ans. Money rent, $1.50 to $2.00 per acre; grain rent, ⅓ of crop.

Re-Examination of Jas. Kemp, Sr.

Re-examined:

Ques. Do you know the date of the commencement of first suit to recover this land?

Ans. I do not.

Ques. In the first visit did he say anything which lead you to believe that the land had been entered?

58 Ans. No, sir.

Ques. State what you meant in your cross-ex. when you said the land might have been entered at the time of Widdicombe's first visit.

Ans. Widdicombe said nothing about it not being entered, but said it would be entered if the patent was not found.

his
JAMES x KEMP.
mark.

Attest: S. P. SPARKS.

Which said Exhibit- "A," "B," and "C," mentioned in said deposition of James Kemp, Sr., are in words and figures as follows, to wit:

EXHIBIT "A."

Ex. "A."—*Tax Receipts Found among Papers of Wm. Kemp by Jas. Kemp.*

Received of William Kemp sixteen & $\frac{78}{100}$ dollars in full of his State and county tax for the year 1854.

80 acres, W. ½ N. E. 24, 47, 21.
32 " p't W. S. E. 6, 46, 20.
80 " W ½ S. E. 13, 47, 21.
40 " S. W. S. E. 24, " "

80 acres, E. ½ S. W. 13, " "
40 " E. ½ lot 1 N. W. 6, 46, 20.
80 " N. ½ S. E. 24, 47, 21.
56 " N. E. N. W. 6, 46, 20.
5 " p't S. E. S. E. 24, 47, 21.
40 " S. W. S. W. " " "
40 " S. E. N. W. 36, 47, 21.
80 " W. ½ N. W. 24, " "
40 " N. E. N. E. 23, " "
40 acres S. E. S. E. 14, 47, 21
59 80 " E. ½ N. W. 25, " "
80 " N. ½ S. W. " " "

WM. H. KELLEBREEN, *Col.*,
By WM. T. BARRY.

EXHIBIT "B."

Ex. "B."—*Tax Rect Found among Papers of Wm. Kemp by Jas. Kemp, Sr.*

$62 $\frac{87}{100}$.

Received, December 15th, 1858, of William Kemp sixty-two and $\frac{87}{100}$ dollars, in full of his State and county and lunatic asylum tax for the year of 1858 for land.

32 acres, N. p't W. ½ S. E. section 6, town. 46, range 20.
40 acres, E. ½ lot 1 N. W. section 6, town. 46, range 20.
20 acres, E. ½ N. ½ lot 1 S. W. section 6, town. 46, range 20.
50 $\frac{87}{100}$ acres, p't lot 2 N. W. & of 2 N. E. section 6, town. 46, range 21.
183 acres, W. ½ N. E. p't S. W. S. E. & p't N. ½ S. E. section 24, town. 47, range 21.
80 acres, W. ½ S. W. section 13, town. 47, range 21.
40 acres, N. E. N. W. section 24, town. 47, range 21.
40 acres, N. E. N. W. section 25, town. 47, range 21.
160 acres, E. ½ S. W. & W. ½ S. E. section 13, town. 47, range 21.
80 acres, W. ½ N. W. section 24, town. 47, range 21.
40 acres, N. E. N. E. section 23, town. 47, range 21.
5 acres, p't S. E. S. E. section 24, town. 47, range 21.
40 acres, S. W. S. W. section 24, town. 47, range 21.
40 acres, S. E. N. W. section 25, town. 47, range 21.
80 acres, N. ½ S. W. section 25, town. 47, range 21.
40 acres, N. E. N. E. section 25, town. 47, range 21.

W. McCLURE, *S. P. C.*

EXHIBIT "C."

Ex. C.—*Tax Rec'l P'd by Jas. Kemp as Adm'r.*

60 Received of Wm. Kemp — dollars, being the amount of State, county, State interest fund, school, and road taxes as-

sessed for the year 1867, in Pettis county, Missouri, on real estate below detailed, including poll and personal property:

Acres.	100th.	Part of section or number of survey.	Sect'n.	Town.	Range.	Value.	Amount.	
80	----	W. ½ of N. W. ¼	24	47	21	1,200	State tax	$3 00
							County tax	4 80
							State interest fund tax	4 80
							School tax	3 60
							Costs	1 69
							Total	17 89

W. H. PORTER.
Collector of Pettis County, Missouri,
By BASSETT, *D. C.*

Testimony of D. W. Cummings for Def'ts.

D. W. CUMMINGS, being produced, sworn, and examined on the part of the defendants, testifies as follows:

I live north of Sedalia. I have lived in Pettis county twenty-four years; lived five years where I now live. Prior to this time I lived at Sinhook, two or two and half miles from the land in controversy. I have known this land since I came here. William Kemp was in possession of it when I came here. It was fenced and part of it in cultivation. He owned the land. Mr. Gorrell owned the 40 lying west of the south forty; think Mr. Harvey owned the eighty adjoining the eighty in controversy. I didn't know much about this land before I bought it. I moved there in 1856. I
61 harvested a crop of oats for Wm. Kemp on the land one or two years after I moved there. From the time of this harvest down to the time I bought I believe Mr. William Kemp owned it. It was generally known that he owned it. I don't remember when I bought it. I owned it three years. I cultivated part and pastured part. I don't think it was all enclosed separately when I bought it. It was inclosed with other land. The north 40 was cultivated and the south 40 was used as a pasture. I used it as a pasture one year and then broke it up. I moved a little house on the north 40. I occupied the land until I sold it to Wm. T. Kemp and claimed it as my own. I paid the taxes on the land for one year and Wm. Kemp for two years. I have lost my receipt.

Testimony of M. Thompson.

MENTOR THOMPSON, of lawful age, being produced, sworn, and examined on the part of the defendant, testified as follows:

I live in Sedalia. I have lived in Pettis county since 1834. I have been county surveyor; was made surveyor in 1835 or 1836

and filled that office for thirty years. During that time I surveyed a great deal of lands in all parts of the county. I have entered a great deal of land in the county for myself and others. I was in the habit of making such entries at the land office. I know the land in controversy. I surveyed the land for Wm R. Kemp. I don't think I surveyed any other lands at the time. His
62 object was to get the lines of the land he owned. I made no record of the survey.

To which evidence the *which the* plaintiff, by his counsel, objected, for the reason the law in force at that time required the county surveyor to make and preserve a record of surveys made by him, and such record would be the only evidence of such survey; which objection was by the court overruled; to which action of the court the plaintiff then and there duly *accepted* after time.

Said witness, continuing his testimony, said: The survey was not made to establish any corner. It was made in the spring of 1849. I found the original Government corner, but established none myself. It was made to show him the lines. The numbers of the land surveyed were the west half of the northwest quarter of section twenty-four and the southeast quarter of section fourteen and the N. E. ¼ of the N. E. ¼ of section 23, township 47, range 21; the land in 24 was prairie. The land was all prairie. I put a stake at the quarter-section corner between sections 23 & 24, at S. W. corner of the eighty in controversy, and I put a rock at the section corner between 13, 14, 23, and 24. Riley Kemp was present when the survey was made. He furnished me the numbers of the land. He gave me the certificate of location. I made the survey from this certificate. I, of course, read it. The numbers contained *it* it were the same I have given you. I was familiar with such certifi-
63 cates. It was regular in form. I thought so. I handle a great many such certificates. I frequently made surveys from such certificates. It purported to be a certificate of location. It was signed by the proper officer. I don't know by whom it was signed. I think it was dated in 1848—had only been entered a short time when I made the survey. Henry Rector claimed that Kemp had not entered this land, and in order to satisfy him produced a certificate. They quarreled some time about it, and in order to satisfy him Kemp went to the house and got his certificate. This was done before the survey was made. It only called for 160 acres. I have never seen the certificate since. I understood that Riley Kemp moved to Oregon. There was no improvement on the land at the time of the survey. It was generally understood throughout Pettis county that all the land therein had been entered prior to 1870. I am satisfied it was all entered in 1870 in that neighborhood. The prairie land was all occupied and fenced. I know the plaintiff. I met him a short time after he got the patent to the land. We had a little controversy about the land, and he produced the patent and showed it to me.

Question. State if you know of his having made any other entries of a similar kind.

Objected to by the plaintiff because the same is irrelevant and incompetent; which objection was by the court overruled;
64 to which action of the court the plaintiff then and there excepted at that time.

I know of one other entry; it was a piece of land belonging to Clifton Wood. I afterwards found Reed's patent. I don't know of any other. Then plaintiff surrendered his patent. Plaintiff told me he had made a great many similar entries, but these two are all he told me particularly about.

Thompson Cross-Ex. by Pl'ff.

Cross-examined by plaintiff's counsel:

I made the survey in 1849. I think we started from the northwest quarter of section 36. I took the certificate in my own hand and read it. I think it was signed by Watson as receiver. I think — only officer signed it. I don't think both the receiver and register signed it. I recollect reading it, and it satisfied me that it was such a paper as emanated from the land office, and from it I got the numbers by which I made my survey. From the time I made the survey down until I heard of Lesenderfer's entry I had nothing to fix the date of survey in my mind.

The name of the land office—"Clinton"—was printed. I don't say it was impossible for me to be mistaken. I don't think I am. I don't know the number or date of the certificate.

65 *Thompson Re-Examined.*

Redirect examination:

The west ½ of the N. W. ¼ of section 25 was brush land; it run out to the edge of the prairie. There was a good deal of unentered land at the time. Prairie lands were about all entered at that time up there. Some little spots were not entered. As a rule, prairie land was entered first.

Thompson Ex. by the Court.

In answer to question by the court witness said:

Mr. Rector claimed that Kemp had not entered the land and Mr. Kemp claimed that he had entered it, and this brought about the difference.

Pl'ff Paid No Taxes on Land in Dispute.

Plaintiff here admitted that he paid no taxes upon the lands in controversy prior to his entry thereof.

Testimony of C. W. Tristoe for Def'ts.

C. W. Tristoe, of lawful age, being produced, sworn, and examined on the part of the defendants, testified as follows:

There was no vacant land in this neighborhood in 1870 or 1871. I went to the land office at Warsaw in 1857 and employed the officers to examine for vacant land in Pettis county, and we, after two days' examination, could only find one vacant piece south of
66 Flat creek. My brother and I went particularly to look for land in the neighborhood of the land in dispute.

Tristow Cross-Examined by Pl'tiff.

Cross-examined by plaintiff's counsel:

It was generally understood that it was all entered, but I wanted to be certain. I did not examine the books myself. I don't remember the names of the officers and I don't know what books the examined.

Tristoe Re-Ex. by Def'ts.

Re-examined by defendants' counsel:

We went to hunt for vacant lands, not for a flaw in the title.

Testimony of Thos. O'Geary for Def'ts.

THOMAS O'GEARY, of lawful age, being produced, sworn, and examined on the part of the defendants, testified as follows:

I live in Benton county, Missouri. I have been living there eight or nine years. I lived at Windsor about four years before that. I kept hotel there. I know the plaintiff. I met him at Windsor. He came to my place and employed me to take him out to Maj. Thos. Neill's, in Johnson county. I did not know what his business was until we got there. He claimed he was entitled to a part of Mr. Neill's land. Neill said it was impossible; that he had lived there thirty years, and that it was a part of his farm. Neill invited us to dinner, and after dinner they compared
67 deeds. Neill said that he would not give it up; that he would try him at law. Going home I asked plaintiff if he would not get into trouble entering land that men had improved; that he could get plenty of vacant land that was clear and vacant that would cause no hard feelings. He said he did not want that kind of land; that he would not pay taxes on it. He wanted land that was improved and rich men owned. That kind of land he could make count before they got it back. I asked him: "Suppose a poor man had an eighty acres of land and there was a mistake against it, if he would take it away from?" He said he would not be so hard with him; he would let him have it for a trifle. He said he was coming back & rent a room of me; that he had to go back to Boonville and find out mistakes in other tracts, and find out if they were worth entering. I contended that it was better to get unimproved lands, but he said he didn't want that kind, but wanted improved lands. He told me he had been to Boonville in that kind of business that summer; that he was going to Boonville

and was coming back; that he would look over the books and see if he could find mistakes in tracts of land the same as in Mr. Neill's case. There were several pieces, he thought, mistakes were made in, and he was going to look into them and see whether they
68 were improved or unimproved. This occurred in 1871 or 1872, in the fall or in the spring.

Cross-Ex. of Thos. O'Geary.

Cross-examined by plaintiff's counsel:

This conversation occurred in the fall of 1871 or in the spring of 1872. We had to inquire the way to Neill's. Neither knew the way. He did not seem to know the way. He and Neill did not seem to be acquainted. I understood from Neill the land which Sensenderfer claimed he had enclosed and lived on it thirty years. I understand that he was going to see these lands in which there were mistakes, and if they were improved he was going back to enter them.

Testimony of Sam'l Swisher for Def'ts.

SAMUEL SWISHER, of lawful age, being produced, sworn, and examined on the part of defendants, testifies as follows:

I live near Windsor, in Pettis county, Mo. I have been living there for fifteen years last fall. I first met the plaintiff in 1871 or 1872. He came to my house and told me he had entered a piece of my land. He told me how he got into the business. He said he had been broke up twice in St. Louis. He said that he had to have some way of making a living. He said he went to Boonville and went in the land office to hunt up mistakes and enter lands. He said he had a lawyer in Washington city who would help him. He was there five or six hours. He appeared to want to stay. He
69 tried to scare me into buying the claim he made of having entered part of my land. I asked him why he entered improved land people were living on, and why he did not enter vacant lands. He said he did not want it; that he would not pay taxes on it if they would give it to him. He told me he had entered the Kemp tract also; he said he had offered to sell to Mr. Kemp, but he wouldn't take it. He said that it had a nice brick house on it. He told me also about the Neill entry. He talked about twenty acres near Clinton. He said he did not know whether the twenty was improved or not; don't know that he said how many entries he had made.

He said that he was living at Boonville. I asked him why he did not go and enter raw land. He said he would not pay the taxes on raw land. He told me it was his business to look up lands and *sell* if he could find any mistakes in the entries of the land.

Cross-Ex. of Sam'l Swisher.

Cross-examined by plaintiff's counsel:

I think we had this conversation in 1872.

Testimony of Marion Thornton for Defendant-.

MARION THORNTON, of lawful age, produced, sworn*ed*, and examined on the part of the defendants, testifies as follows:

I live eight miles south of Sedalia; have lived there for
70 thirty-four years. I met Mr. Lensenderfer once. I think it
was nine or ten years ago; met him about nine or ten miles northeast of here, at the house of W. D. Cummings. He came while I was there. Cummings lived three miles from the land in controversy. I had a conversation there with him at Cummings' house. He said that he had been out to see this land, and that it was well improved, and that he (plaintiff) had entered it, and that he had offered to pay Kemp for his improvements and compromise it in that manner. He staid there a long time, and we had quite a lengthy talk, and it is hard for me to remember it. He told me he had been unfortunate and had been broken up, and that he had been engaged in entering Government lands; don't know whether he showed me a list of lands or not. He told me that he had entered a considerable amount of land. He told me about the Kemp and Chamberlain tracts of land; that he was now looking up these tracts of land; told me that he was either living in St. Louis or had been living there; didn't tell me the character of the lands he was entering, nor his
manner of entering. I asked him if he thought it was right
71 to attempt to dispossess people who had improved lands, and he said he was not bound to make good the mistakes of others; that it probably occurred through the mistakes of the officers of the land office. I had reference to the Kemp tract when I asked him this question. I knew that he had entered improved land by knowing this tract. He said he had been a clerk in the land office himself and was familiar with the way of doing business there, and he knew about such mistakes, and that it — possible for mistakes to occur.

Testimony of Jno. S. Lingle for Defendants.

JOHN S. LINGLE, produced, sworn, and examined on the part of the defendants, testified as follows:

I live in Sedalia. I am seventy years old. I used to live in Warsaw, Mo. In 1849 I was clerking for John Atkerson. I was not employed in the land office. I knew the building the land office was in. The office was burnt in the fall of 1861. The day after the fire I saw lots of scorched and burnt papers, from the burnt building, scattered over the town.

72 Defendants here read in evidence the copy of a letter attached to the deposition, taken at Boonville, in relation to the burning of the office at Warsaw.

After which said witness, in continuation of his testimony, said:

I knew M. L. Means. He lived at Warsaw. I knew him twelve years. He was register at the land office. I knew his writing very well. I can't say that the writing shown me is the writing of M. L. Means.

Testimony of S. L. Highleyman for Defendants.

S. L. HIGHLEYMAN, being produced, sworn, and examined on the part of defendants, testified as follows:

In 1866 and 1867 I was living in Sedalia. I was deputy county clerk from 1866 to 1872. The circuit clerk and recorder were consolidated. This man was in the county clerk's office up to the time Crandall was elected recorder. It was in the office as part of the records; have not had occasion to examine the map for several years.

When the offices of clerk and recorder were separated the county court directed the plat of entries from the land office to be kept in the recorder's office.

F. P. Wright's Testimony for Def'ts.

FOSTER P. WRIGHT, being produced, sworn, and examined on the part of the defendants, testified as follows:

73 I knew M. L. Means; he was circuit attorney while I was judge. I knew his handwriting very well. I recognize the writing and signature as his. On the certificate attached to the map of entries here shown me the certificate and signature is in his writing.

Testimony of S. W. Ritchey, Recorder.

It is here agreed that Samuel Ritchey, recorder of deeds within and for Pettis county, testifies that the plat or map of entries shown to the witness Wright is part of the records of his office, and that he found it there when he went into the recorder's office in 1878.

Defendants here read in evidence the deposition of Mat. Umstead, which is as follows:

Deposition of M. Umstead.

Deposition — Matt. Umstead, produced, sworn, and examined on the 31st day of August, in the year of our Lord one thousand eight hundred and seventy-five, between the hours of eight in the forenoon and six o'clock in the afternoon of that day, at the law office of W. B. Brack, in the city of Sherman and in the county of Greyson and State of Texas, before me, C. V. Cockrell, a notary public in the county of Greyson and State of Texas, in a certain cause now pending in
74 the circuit court of the county of Pettis, in the State of Missouri, between Wm. Sensenderfer, plaintiff, and James T. Kemp, administrator, *et al.*, defendants, on the part of the defendants.

MATT. UMSTEAD, of lawful age, being produced, sworn, and examined on the part of the defendants, deposeth and saith:

My name is Matt. Umstead; age, 29 years; by occupation, a farmer; residing at present in Greyson county, Texas. I am acquainted — Wm. Sensenderfer, plaintiff in the above cause. I first knew him in September, 1873. I met him at a hotel in Warrensburg, Missouri; have known him ever since. Sensenderfer was boarding at the same house with me. He did not then have any business, as far as I could see, but Sensenderfer told me what his occupation had been. He stated to me that previous to his coming to Warrensburg he had been engaged assisting in the United States land office at Boonville, Missouri. I don't remember that he gave the date more precisely than stated. He stated that he had some position in the U. S. land office at Boonville, Missouri. I cannot remember the position or just what his connection with the office was. He said he was engaged then looking up titles to land.
75 He never asked me to engage with him in entering land in Cass county, Mo. He wanted me to go and live on them and claim them as a homestead under the United States homestead laws. He told me the tract was not improved, and was vacant, and was claimed by a non-resident. He told me I could have half of it, and that the land had been entered by wrong numbers in the land office in Boonville, Missouri. Sensenderfer did tell me something about entering the tract of land in Johnson county, Missouri, claimed by one Thomas Neal. The land referred to is the same land that Sensenderfer sued Neal for in Johnson county. He also told me that Neal had entered the land in question a long time before, but had made a mistake in the entry in the numbers, and that he found out the mistake while in the land office in Boonville, Missouri. He also told me there were other lands in the same condition. He stated to me that he had been about the U. S. land office at Boonville, Missouri; while there he had examined the records a good deal and had found that in Johnson county, Missouri, there was several pieces where the parties entering or trying to enter had made mis-
76 takes, and stated he was working them up.

MATT. UMSTEAD.

Sworn to and subscribed before me on the day, at the place, and within the hours first aforesaid.

J. V. COCKRELL,
Notary Public, Guyer County, Tex.

The defendants next read in evidence the deposition of Gustavus Ritchey, which is as follows:

Deposition of Gus. Reiche for Defendants.

Deposition of witness produced, sworn, and examined on the 30th day of August, A. D. 1875, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, at United States land office in the city of Boonville, Cooper county and State of Missouri, by consent of parties, before me, John Cosegrove, a notary public within and for said county, and who was duly qualified March 24th, 1874, and that my commission will expire on 3rd of March, 1878, in a certain cause now depending in the circuit court of Pettis county, Missouri, between William Sensenderfer, plaintiff, and James T. Kemp, adm'r, *et al.*, defendants, on the part of the defendants.

GUSTAVUS REICHE, of lawful age, being produced, sworn, and examined on the part of defendant-, say-:

77 My name is Gustave Reiche; my residence is in the city of Boonville; I am register of the United States land office in the city of Boonville, Mo. I have held this office since the first day of July, 1874.

Books shown witness and identified by him as tract book, Warsaw district, township 47, from range 21 to range 33; township 48, from range 21 to range 26.

This book purports to be a copy of the tract book of the entries made at the Warsaw land office and certified to Washington, and a certified copy sent from the General Land Office at Washington to this—that is, it is a certified copy from the General Land Office at Washington, D. C., of the entries made in the Warsaw, Mo., district. From the records on file in this office I find that the books of entry at Warsaw were burned.

This information is conveyed by letter from the General Land Office at Washington, dated February 12th, 1863, a copy of which is herewith filed, marked Exhibit "A."

On page five of the book referred to I find the following entry of record, to wit: Under the entrys in section 14, township 47, range 21, there appears the following entry: "S. E. ¼ of S. E. ¼, s e sec. 25." This entry appears in red ink. On page 9 of this book, under the head of section 25, township 47, range 21, appears the following entry

78 in red ink: "S. E. ¼ of S. E. ¼ 14, N. E. ¼ of N. E. ¼ 23, & W. ½ of N. W. ¼."

Under the head of acres, 160, opposite this, the following appears

in red ink: "Located by W. R. Kemp, assignee of Thomas W. Henley, June 13th, 1848, with M. B. L. W. No. 1384, act Feb'y 11, 1847," a copy of which entries is herewith filed, marked Exhibit "B."

On the same page, 9, of said book there appears the following other entry under the head of section 25, township 47, range 21: E. ½ of S. W. ¼ & N ½ of S. W. ¼, and opposite this, under the head of acres, "160," and opposite, located by Wm. R. Kemp, assignee of David S. Crow, June 13th, 1848, M. B. L. W. No. 6227, act Feb'y 11, 1847.

A copy of which entry is herewith filed, marked Exhibit C.

Question by deft's att'y. Look at said book of entries and state what the same shows with regard to the west half of the N. W. ¼ of sect. 25, township 47, range 21.

Answer. On page 9 of said book, right under the entry first above quoted on page 9, the following entry appears: The S. W. ¼ of N. W. ¼ sec. 25, township 47, range 21, is purported to be entered by Simeon Payne, Nov. 29th, 1853; No. of certificate of purchase, 36617, and under this last entry and on the same page appears the following other entry:

79 The N. W. ¼ of N. W. ¼ section 25, township 47, range 21, by Berry L. Greer, Jan'y 16, 1854; No. of entry, 37026.

These last entries of Payne and Greer are made in black ink, copies of which entries are herewith filed, marked Exhibit D.

The letters "M. B. L. W.," as they appear on said book, mean "military bounty land warrant," and the words "act 11 Feb., 1847," refer to the act of Congress under which the land warrant was issued.

Cross-examined by the plaintiff's attorney waived.

GUSTAVO REICHE.

Subscribed and sworn to before me on the day, at the place, and between the hours first aforesaid.

JOHN COSGROVE,
Notary Public.

Which said Exhibits "A," "B," "C," and "D" are in words and figures as follows, to wit:

EXHIBIT "A."

Letter from Com'r Gen'l Land Office to Reg. & Rec'r.

GENERAL LAND OFFICE, *February* 12, 1863.

GENTLEMAN: In accordance with the provisions of the law the President of the United States has directed the discontinuance
80 of the land office at Calhoun, Mo., and that the unsold lands in the district be attached to the Boonville district, where they will be made subject to sale and location hereafter.

It having heretofore been reported to this office that the whole contents of the register's and receiver's offices at Calhoun were burned some months since by the rebels, there of course remains nothing to be delivered to you.

This office is now opening a new set of tract books, in which are posted the lands heretofore disposed of in the "western district," either at Warsaw or the other sites of the offices for the district.

These books will be shortly transmitted, and upon there receipt you will issue a notice once a week for six weeks in two papers having the largest circulation in your own and the discontinued district, specifying the day on which you will be prepared to receive applications for the entry of lands in the old "western district." So far as applicable, the general instructions contained in letter to you of July 15th, 1861, respecting the discontinuance of the St. Louis district, will be applied to the present case, particularly as regards the numbering of applications, entries, &c., and you are therefore referred to those instructions.

81 Enclosed is a copy of the public notice No. 688 of the discontinuance of the Calhoun or "western district," which you will cause to be published as above directed and for a like period of time, not, however, awaiting the receipt of the tract books, but give immediate publicity thereto.

Printed copies of the above will be sent you for distribution.

The receiver, as district agent, is authorized to defray the expense of these publications, referring on his vouchers to *to* the date of this letter.

You are requested to acknowledge the receipt hereof.

Very respectfully, J. CHAS. EDWARDS, *Comm.*

Register & receiver, Boonville, Missouri.

U. S. LAND OFFICE,
BOONVILLE, MO., *August the 30th*, 1875.

I, Gustave Reiche, register of said office, hereby certify the foregoing to be a true, full, and correct copy of the original thereof as the same appears and remains on the files of official letters of this office.

In testimony whereof I have hereunto set my hand (this office having no official seal), at office, in Boonville, Mo., the day and year last above written.

GUSTAVE REICHE, *Register.*

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EXHIBITS B, C, & D.

Page 5.

Township No. 47 north, range No. 21 west, district of ——.

Description of the tracts.				Contents.	Rate per acre.	Purchase-money.	Name of purchaser.	Date of sale.	No. of receipt and certificate of purchase.	To whom patented.	Date of patent.	When recorded.	
Part of section.	Section.	Township.	Range.									Vol.	Page.
				Acres. 100ths.	$ c.	$ c.	*Purchaser.*						
S. E. ¼ of S. E. ¼	14	47	21	Exhibit B,	J. C., no	tary		Act 1850. -Dec. 28,	1870; R.	& R. No.,	1238.		
Page 8:	See	sec.	25.										
W. ½ N. W. ¼	24	47	21	80	By William	Sensen	derfer, w't No. 16307	June 13, 1848, with	M. B. L.	W. No.	1384, act	11 Feb'y,	1847.
Page 9:	"	"	"										
S. E. ¼ S. E. ¼ 14, N. E. ¼ of N. E. ¼ 23, & W. ½ of N. W. ¼	25	47	21	160	Located by Wm. R.		Kemp, assignee of Thos. W. Hendley.				Exhibit "B," J. Cosgrove, notary.		
S. W. ¼ of N. W. ¼	"	"	"	40	1 25	50	Simeon Payne	Nov. 20, 1853	30617	Exhibit	"D," J.	Cosgrove, notary public.	
N. W. ¼ of N. W. ¼	"	"	"	40	1 25	50	Berry L. Greer.	Jan'y 16, 1854	37026	Exhibit	"D," J.	Cosgrove, notary public.	
E. ½ of N. W. ¼ & N. ½ of S. W. ¼.	"	"	"	160	Located by Wm. R.		Kemp, assignee of David S. Crow.	June 13, 1848, with Exhibit "C," J.	M. B. L. Cosgrove,	W. No. notary public.	6227, act	11 Feb'y,	1847.

U. S. LAND OFFICE, BOONVILLE, MO., *August* 30, 1875.

I, Gustave Reiche, the undersigned, register of said office, hereby certify the foregoing entries and locations to be a full and correct transcript from the official tract — of this office, as appears of record.

In testimony whereof I have hereunto set my hand, this office having no official seal, at office, in Boonville, Mo., the day and year last above written.

GUSTAVE REICHE, *Register.*

85 Defendants next read in evidence the deposition of Geo. Ritchey, John M. Gotts, — A. C. Widdecombe, which are in words and figures as follows:

Deposition of Geo. Ritchey for Def'ts.

GEORGE RITCHEY, of lawful age, being produced, sworn, and examined on the part of the defendants, —:

I am twenty-seven years of age; reside in Boonville, Mo., and am receiver of the public monies at the United States land office at Boonville, Mo.; have been receiver since the 1st day of March, 1874. I have never seen the original records of the Warsaw office in this office, and this office embraces the district of lands embraced in the Warsaw office. That district was formerly known as the Calhoun or western district of Missouri. I am not acquainted with the plaintiff.

GEORGE RITCHEY,
Rec'r U. S. L. O.

Subscribed and sworn to before me on the day, at the place, — between the hours first aforesaid.

JOHN COSGROVE,
[SEAL.] *Notary Public.*

Gus. Reiche Recalled by Pl'ff.

GUSTAVE REICHE recalled by plaintiff's attorney:

The letter dated Nov'r 15, 1872, a copy of which is hereto attached and marked Exhibit "E," appears on file among the official letters in this office.

86 The original letter here shown the witness, and he identifies it as the letter received from the Commissioner of the General Land Office at Washington, D. C.

Re-examined by the defendant in the case of Wm. Sensenderfer against Samuel Swisher:

The book shown witness as containing entries made at the land office at Warsaw, in sections 32 and 33, township 44, range 23. It is admitted by the counsel for the plaintiff and defendants that this book is a record of the land office at Boonville, Mo.

On page 11 of said book appears the following entries of record, to wit:

E. ½ of N. E. ¼ 32, 44, 23. See section 33.

W. ½ N. E. ¼ 32, 44, 23, 80, 1.25, 100, Wm. Sensenderfer, 24 Sept., 1870, 41354.

E. ½ of N. E. ¼ 33, 44, 23, 80.00, located by Benjamin W. Brice, 1699, Nov. 21, 1856, per M. L. W. No. 40872, act 1855.

W. ½ of N. E. ¼ 33, 44, 33, 80.00, located by Mitchell M. Lampton, 441, June 17, 1856, per M. L. w't No. 26384, act 1855.

W. ½ N. E. ¼ 33, 44, 23, 80.00, located by Benjamin W. Brice, 1700 Nov. 21, 1856, per M. L. w't No. 201, act 1855.

E. ½ of N. E. ¼ 32 & N. W. ¼ 33, 44, 23, 240, 75, 180.00, Mitchell M. Lampton, No-. 16th, 1855, 46047.

N. E. ¼ of S. W. ¼ 33, 44, 23, 40.00, 1.25, 500, Mitchell Lampton, July 5, 1856, 48860.

87 N. E. ¼ S. E. ¼ 32 & N. W. ¼ of S. W. ¼ 33, 44, 23, 80.00, 75, 60.00, Mitchell M. Lampton, April 26, 1856, 47993; a copy of which said entries is herewith filed, marked Exhibit "F."

GUSTAVE REICHE.

Subscribed and sworn to before me on the day, at the place, and between the hours first aforesaid.

JOHN COSGROVE,
Notary Public.

Which said Exhibits E and F are in words and figures as follows, to wit:

EXHIBIT "E."

Letter from Act. Com'r to Reg. & Rec'r.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov. 15th*, 1872.

Register & receiver, Boonville, Mo.

GENTLEMEN: Your attention is called to the following locations with military warrants, act of 1855, which are found to be in conflict, after a careful examination and comparison of the records, with the papers on file, viz:

88 Warsaw R. & R. No. 44, June 17th, 1856, in the name of M. M. Lampton, warrant 26384, W. ½ of N. E. ¼ sec. 33, 44 N., 23 W., patented Apr. 1, 1859, and Warsaw R. & R. No. 1700, Nov. 21, 1856, in the name of Benjamin W. Brice, warrant 201, 160 acres, W. ½ of N. E. ¼, said section 33.

Mr. Brice's location is therefore invalid because of the prior location of said tract by Mr. Lampton, but it appears was inadvertently allowed and patented Nov. 10th, 1859, and the patent sent to the Hon. Piderd Lovejoy, House of Representatives, May 17th, 1860.

You will inform Mr. Brice of the foregoing facts, and that upon a duly executed relinquishment of his patent to the U. S. and application through your office in the usual form the warrant may be returned, with a certificate attached authorizing its relocation.

Very respectfully, W. W. CURTIS,
Acting Commissioner.

U. S. LAND OFFICE,
BOONVILLE, MO., *August 30th*, 1875.

I, Gustave Reiche, register of said office, hereby certify the foregoing to be a true and correct copy of the original thereof as it appears and remains on the official letter files of said office.

Witness my hand (this office having no official seal), at office, in Boonville, Mo., the day and year last above written.

GUSTAVE REICHE, *Register.*

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EXHIBIT F. J. Cosgrove, Notary Public.

Page 11.

Township 44 N., range No. 23 W., district of ——.

Description of the tracts.				Contents.	Rate per acre.	Purchase-money.	Name of purchaser.	Date of sale.	No. of receipt and certificate of purchase.	To whom patented.	Date of patent.	Where recorded.	
Part of section.	Section.	Township.	Range.									Vol.	Page.
				Acres 100*ths*. See sec. 33.	$ *c.*	$ *c.*							
E. ½ of N. E. ¼	32	44	23										
W. ½ of N. E. ¼	"	"	"	80	1 25	100	Wm. Sensenderfer	27 Sept., 1870	41234				
N. W. ¼ of S. E. ¼	"	"	"	40	1 25	50	Mitchell M. Lampton	April 26, 1856	47993				
N. E. ¼ of S. E. ¼	See	sec.	33.										
E. ½ of N. E. ¼	33	44	23	80.00	Located by		Benjamin W. Brice	1699, Nov. 21, 1856,	per M. L.	w't No.	40872, act	1855.	
W. ½ of N. E. ¼	"	"	"	80.00	Located by		Mitchell M. Lampton	441, June 17, 1856,	per M. L.	w't No.	26384, act	1855.	
W. ½ of N. E. ¼	"	"	"	80.00	Located by		Benjamin W. Brice	1700, Nov. 21, 1856,	per M. L.	w't No.	201, act	1855*	
E. ½ of N. E. ¼, 32, & N. W. ¼	"	"	"	240.00	75	180 00	Mitchell M. Lampton	Nov. 16, 1855	46047				
N. E. ¼ of S. W. ¼	"	"	"	40.00	1 25	50 00	Mitchell M. Lampton	July 5, 1856	48860				
N. E. ¼ S. E. ¼, 32, & N. W. ¼ of S. W. ¼	"	"	"	80.00	75	60 00	Mitchell M. Lampton	April 26, 1856	47993				

*See letter from Com., Nov. 15, '72.

U. S. LAND OFFICE, *August* 31, 1875.

I, Gustave Reiche, the undersigned, register of said office, hereby certify the foregoing entries and locations to be a full, true, and correct transcript from the official tract book of this office as they appear of record.

In testimony whereof I have hereunto set my hand (this office having no official seal), at office, in Boonville, Mo., the day and year last above written.

GUSTAVE REICHE, *Register*.

91 *Deposition of John Gott for Def'ts.*

JOHN GOTT, of lawful age, being produced, sworn, and examined on the part of the defendants, deposeth and saith as follows:

I am forty-one years of age and reside in Boonville. I am now book-keeper in the Central National — of Boonville, Mo. I held the office of receiver of public monies in the land office at this place from Feb'y, 1870, to 1st of Feb'y, 1874. I was a clerk in the office for one year prior to the commencement of my office as receiver. (The books of record mentioned in the deposition of Gustave Reiche shown witness and were identified by him as the same books that were in the office while he was clerk and receiver therein.) They are called tract books. These were the only tract books used in this office pertaining to the land mentioned in them. I am acquainted with the plaintiff in this suit; have known him since the spring of 1870. I first became acquainted with him at this place in the U. S. land office. He remained here the greater portion of the following two years. He had no position in the land office during that time. He was at the land office during the time he stopped here nearly every day. He appeared to be making examinations of the records with a view of entering and locating lands. There did not
92 appear to be any one assisting him in his examination of the records. His examinations of the records were confined to the tract books above referred to. During the greater portion of the year 1870 William Whist was register of lands in the land office of this place.

The method pursued by Mr. Sensenderfer in making examinations of the records in this office during the time he was here was to check off in pencil on plats the land that had been entered as appeared by the tract book. The vacant descriptions on the plats were supposed to show the vacant public lands, and from these he made his entries.

The rule with regard to entries made under military land warrants in the office was to make them in red ink on the tract books in the office, giving a description, the area, name of locator or assignee, and date of location, number of warrant, the act under which the warrant was issued. There was in addition to the tract books a book or register known as the register of "warrant locations." All warrant locations were posted in this book.

The entries in the tract book as certified from Washington were not always found to be correct. Mr. Sensenderfer, during his stay here, became acquainted with the fact that there were errors
93 in said book. It was a matter of conversation in the office. This office does not contain all the records kept at the Warsaw office. This tract book purports to be a copy of the books in the General Land Office at Washington city as made up there from the reports from the Warsaw office. Mr. Sensenderfer made a number of entries of land, in different counties; made some in Pettis, some in Henry, some in Cass, and some in Johnson, and some north of the river.

I remember of hearing Mr. Sensenderfer say that after he made the entries that he went to see the lands and found some of them occupied and claimed by other parties. I understood from Mr. Sensenderfer that he came here from St. Louis; that he had been living in St. Louis for a good many years. I heard him say that he lived, before he went to St. Louis, in Quincy, Ill. He also stated that he had been in Colorado; that he had some agricultural and mineral lands there. I also heard him say that he was in the habit of corresponding with an att'y or att'ys at Washington, D. C., with regard to the entries that he had made after he found that there were adverse claims to the land.

In some instances he expressed a doubt about the lands being subject to entry.

Cross-examined by the plaintiff:

94 These tract books were copied from the original tract books at Washington. The tract books that were destroyed at Warsaw were made from pasting the applications made at that office into the tract books.

The tract books at Washington and from which the book in this office was copied was made up from the reports from the office at Warsaw and the original applications forwarded from the Warsaw office. The tract books in this office contain all the entries made in this district.

This district as now constituted contains fully three-fourths of the terr'y of this State.

Question by plaintiff's att'y. Can a stranger tell by reference to these books what lands have been entered?

Ans. Yes, if he can read and write.

Question by pl'ff's att'y. Did Mr. Sensenderfer persue the usual method of those desiring to locate land at this office in his examination of the books at this office?

Ans. Yes.

The above questions and answers were objected to by defendant's attorney.

Question by pl'ff's att'y. Are these books open to all persons desiring to locate lands?

Ans. Yes, sir. The instructions of the department are to keep them in an accessible place and open to the inspection of those desiring to look at them.

95 Question by pl'ff's att'y. Are not all the lands not shown to have been entered by this book open to entry?

Answer. Yes, sir; and the officers are instructed to regard such as undisposed of and subject to entry.

Question and answer objected to by def't's attorney.

Question by pl'ff's att'y. Was not your testimony in your direct examination in answer to questions propounded to you by def't's att'y?

Ans. Yes, sir; I so regarded it.

Re-examined by def't's att'y:

It was generally considered that at the time the plaintiff was here that all the lands in Pettis and Johnson counties were entered prior to that time, but on close examination it was found that there were some vacant tracts in those counties.

JNO. A. GOTT.

Subscribed and sworn to before me on the day, at the place, and between the hours aforesaid.

JOHN COSGROVE,
Notary Public.

For want of time to complete the taking of these depositions the taking of the same is continued to the 31st day of August, at the same place and between the same hours.

96 *Deposition of A. C. Widdicombe for Def'ts.*

A. C. WIDDICOMBE, of lawful age, being produced, sworn, and examined on the part of the defendants, deposes and says:

My age is thirty-three; I reside in Boonville, Mo.; I am an attorney-at-law; I have been an attorney for ten or eleven years. I am acquainted with the plaintiff in this case. I first met him in 1869 or '70; I met him in Boonville; I saw him frequently in the land office at Boonville and on the streets. He was examining the records when I saw him — the land office. I have seen his name on the records of the land office, and from conversations I have had with him I know that he had entered lands at the Boonville office. He did not confer frequently with me about making entries of land. I know about him entering land in Pettis county. I can speak positively of his having entered in sec. 6, township 45, range 23. I know of his entering the Kemp tract in controversy in this suit. I obtained for him from the General Land Office at Washington a certified copy — the original application of Wm. R. Kemp some time subsequent to his making the entry—the plaintiff's entry. This application, of which I obtained a certified copy, was the application of Wm. R. Kemp touching the land in controversy. I think I made this application in writing. I am satisfied it
97 was in writing. I was in Washington at the time, and I received a letter from the plaintiff requesting me to get a certified copy of the application of Wm. R. Kemp. At the same time I obtained for him a certified copy of an entry in Johnson county.

I think the plaintiff was in Boonville when I went on to Washington. He did not speak to me about these entries before I went to Washington, I was in Washington from November, 1871, to August, 1872. I returned to Washington after that, and then returned to Boonville in October, 1873. I was practicing my profession in Washington during my stay there; my principal business was in the General Land Office and Interior Department. I have a brother

named William H. Widdicombe, who resided here three years prior to 1871. He now resides in Bates county, Mo. Some time in the early part of 1875 he was engaged in Pettis county in assisting parties to perfect erroneous land titles. He made Boonville his headquarters during that time. He never held any official position in the land office department. He occasionally examined the records in the land office.

He did not during that period make any entries of land. He never made any entries. Prior to the time my brother
98 went to Pettis county I made entries of land in Pettis county and elsewhere. I have made a hundred entries of land during the last ten years at Boonville. William Whist was register, I think, at Boonville in the fall of 1869. Prior to that time James H. Baker was register, and prior to him John F. Wilandy was register, and prior to him George W. Boardman was register. He was register from the spring of 1861 to the winter of 1866. I was here during the time Boardman was register. Mr. Boardman is a brother-in-law of mine. I never was a clerk in this office. I have been conversant with the records of the U. S. Land Office at Boonville since 1864.

I never heard of the plaintiff in this suit until he came to Boonville.

I made an entry in this same section, 6, 45, 23. I made it before the plaintiff made an entry in the same section.

I entered the west ½ of lot one of the N. E. ¼ of said section on Jan'y 2, 1869, and the plaintiff entered the southwest ¼ of S. E. ¼ — said section January 26th, 1871.

The plaintiff while here was very reticent with me as to what entries he was making.

Cross-examined by the plaintiff:

Question by pl'ff's. What is the date of my letter to you in
99 reference to the obtaining certified copies of entries from the Land Office at Washington and which was referred to by you in your direct testimony?

Answer. I have refreshed my memory since I gave my direct testimony by refer-ing to my correspondence with the General Land Office, and find that the letter must have been dated the lat-er part of January, 1872.

A. C. WIDDICOMBE.

Subscribed and sworn to before me this 31st day of August, 1875, at the place and between the hours aforesaid.

[SEAL.] JOHN COSGROVE,
Notary Public.

Stipulation and Agreement.

It is hereby stipulated and agreed between the plaintiff, William Sensenderfer, and the defendants in the case of the said Sensenderfer *vs.* Jos. T. Kemp, adm'r, *et al.*, and the same plaintiff against Sam-

Township No 47 Range No 21

No 280, 7
Folio 101. 3

Geo S Priest	Henry Barnes	Geo S Priest					
Geo S Priest	Henry Barnes	Priest					
Geo S Priest		Jno. C. Rains	Geo S. Priest	14		3	
	Geo S Priest	Henry Rains	Jno R Kemp				Eginia M R Kemp
	Henry Barnes	Jno. C. Rains	Jno R Kemp	Wm Dickens	James Kemp	Wm Kemp	Eginia M R Kemp
Alonzo	Fristoe		James Kemp	Wm Dickens	Berry L. Green	Wm Kemp	Thos A. Kemp
		28				24	
	Alonzo		Henry Rector	Henry Rector		Wm Kemp	
	Fristoe	N Ferguson	Henry Rector	Luke Parmer	Henry Rector	Wm Kemp	Jno R Kemp
		Jno		Berry L. Green			James Kemp
		26		Simeon Rogers	Wm R Kemp	25	Berry L. Green
				Wm R Kemp			Berry L. Green
				Dickens Farmer	Ezekiel Green	Berry L. Green	Wm Ford

uel Swisher that the foregoing depositions m-y be read in both of said causes so far as the same are relevant and competent.

This August 31st, 1875.

WM. SENSENDERFER.
PHILLIPS & VEST,
JNO. MONTGOMERY, JR.,
Att'y- for Def't-.

100 *Certificate Attached to Map of Entries on File in Recorder's Office.*

The defendants next produced and offered to read in evidence the certificate attached to said map of entries on file in the recorder's office, and also the entries on said plat in section 14, 23, 24, and 25 of township 47 and of range 21; to the introduction of which said certificate and said portion of said map of entries in evidence—

Plaintiff, by his counsel, then and there objected, for the reason because the same is not certified and authenticated as required by law, and because the same does not give or purport to give the No. of survey or No. of acres in any tract shown thereon.

Which objections were by the court overruled and the same permitted to be read in evidence.

To which ruling and action of the court the plaintiff then and there duly *accepted* at the time.

Said certificate and said entries are in words, figures, and form as follows:

(Here follows diagram of plat marked p. 101.)

102 I, Mark L. Means, register of the land office at Warsaw, Mo., do certify that this and the accompanying township plats embraces all the territory in Pettis county, Missouri, with the names of the original purchasers endorsed on each tract purchased at said land office, as appears by the original plats, books, & records at said office, and that said plats are correctly transcribed, with the endorsements thereon.

Given under my hand this 1st day of July, 1858.

M. L. MEANS, *Register.*

Defendants next offered and read in evidence the depositions of Thomas W. Eustice and John F. Philips, which are in words and figures:

Deposition of T. W. Eustice.

Depositions of witnesses produced, sworn, and examined before me, F. M. Heaton, a notary public in and for the city of Washington, District of Columbia, at the anteroom to the office of the Commissioner of the General Land Office, in the Department of the Interior, city and District aforesaid, on the 8th day of May, 1880, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day, to be read in evidence in the cause of William Sensenderfer, plaintiff, against Samuel A. Kemp *et al.*, pending in the circuit court of Pettis county, State of Missouri.

103 *Deposition of Thos. W. Eustace for Defendants.*

THOMAS W. EUSTACE, of lawful age, being produce, sworn, and examined on the part of the defendants, deposes and says: My present residence is Washington city, D. C., as a clerk in the General Land Office; been so employed since April, 1873.

The paper shown him is temporarily in his custody as book-keeper for the State of Missouri, a copy of which paper is herewith filed, marked Exhibit "A."

Plaintiff's counsel, W. H. Beck, objects to the introduction of or taking of any testimony relating to the official papers or conduct of the general or local land offices. That is a matter of record, and can be officially certified to by the Commissioner of the General Land Office.

Further deponent saith not.

THOS. W. EUSTACE.

Subscribed and sworn to before me at the place, on the day, and between the hours first aforesaid.

F. M. HEATON,
Notary Public.

Which said Exhibit "A" referred to in the deposition of Thos. W. Eustace is in words and figures as follows:

104 EX. A.

C. DEPARTMENT OF THE INTERIOR, T. W. E.
GENERAL LAND OFFICE, M. E. N. H.

WASHINGTON, D. C., *Sept. 9th*, 1880.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed copy of the application to locate military bounty land warrant No. 1384, issued to Thomas W. Henley under the act of Congress of February 11th, 1847, is a true and literal exemplification of the original now on file in this office.

In testimony whereof I have hereunto subscribed my
[SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

J. A. WILLIAMSON,
Commissioner of the General Land Office.

Application to Locate Warrant # 1384.

(Copy of application to locate warrant 1384.)

I, William R. Kemp, of Pettis county, Mo., hereby locate the S. E. ¼ of the S. E. ¼ of section No. 14, the N. E. ¼ of the N. E. ¼ of section No. 23, & the W. ½ of the N. W. ¼ of section No. 25, in township No. 47, of range No. 21, containing one hundred and sixty acres, in satisfaction of the within warrant.

(Signed) WILLIAM R. KEMP.

June 13th, 1848.

105 Attest: W. WATSON, *Register.*
DAN'L ASHBY, *Rec'r.*

LAND OFFICE, CLINTON, MO., *July 31st*, 1848.

We certify that the above location is correct, being in accordance with law and instructions.

W. WATSON, *Register.*
DAN'L ASHBY, *Rec'r.*

Deposition of Jno. F. Philips for Defendants.

JOHN F. PHILIPS, of lawful age, being produced, sworn, and examined on the part of the defendants, says:

That I am 45 years old; residence, Sedalia, Missouri; at present residing at Washington, D. C., and a member of the 46th Congress.

I was well acquainted with Dr. W. Watson in his lifetime. I lived in the same town, Georgetown, Pettis county, Missouri, from 1856 to 1862; for one year of this time I boarded in his family, and he was my family physician. After his return from Oregon, after the war, I resided in Sedalia, Missouri. I had frequent business transactions with him and was quite familiar with his handwriting, having frequently corresponded with him and seen him write. I have examined and now hold in my hand the original of the paper marked Exhibit "A," referred to in the deposition of Thomas
106 W. Eustace, and am satisfied that the application in question is the handwriting of said Watson, who was then register of the land office at Clinton, Missouri. The writing in the application and the signature of Watson are evidently in the same ink, and the formation of the capitals W, which is peculiar to his signature, leaves no doubt in my mind that he wrote the application.

Cross-ex. of Jno. F. Philips by Pl'ff.

Cross-examination by Mr. BECK, att'y for pl'ff:

The certificate to the application is, in my opinion, also the handwriting of Dr. Watson, but there is an apparent dissimilarity, in that the certificate is written more carefully and in a finer hand than the application. There is this further dissimilarity, that the figures 1 in the certificate differ somewhat from the same figures in the application, in this, in the certificate they have a slight upward stroke, which is not common to those in the application, but there is a striking similarity in the other figures common to both writings. The letter W in the certificate impress- me more than anything else that Watson wrote the certificate. In this I may be mistaken, but I have no doubt as to the application being in Watson's handwriting.

JNO. F. PHILIPS.

107 Subscribed and sworn to before me at the place, on the day, and between the hours first aforesaid.

F. M. HEATON,
Notary Public.

Pl'ff Objects to Depositions of Eustace & Philips.

To the introduction of which said depositions and evidence the plaintiff at the time objected becau-e they nor either of said depositions tend to establish any material fact at issue in this cause.

Which objections was by the court overruled; to which ruling and action of the court the plaintiff then and there duly accepted at the time.

Defendants next read in evidence a patent from the United States to Simeon Payne for the S. W. ¼ of the N. W. ¼ of sec. 25, t'p 47, range 21, dated the first day of May, 1854, which is in words and figures as follows:

S. Payne's Patent.

Certificate No. 36617.

United States of America to all to whom these presents shall come, Greeting:

Whereas Simeon Payne, of Pettis county, Missouri, has deposited in the General Land Office of the United States a certificate of the register of the land office at Clinton, whereby it appears that
108 full payment has been made by said Simeon Payne, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the southwest quarter of the northwest quarter of section twenty-five, in township forty-seven, of range twenty-one, in the district of lands subject to sale at Clinton, Missouri, contain-

ing forty acres, according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Simeon Payne:

Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such cases made and provided, have given and granted, and by these presents do give and grant, unto the said Simeon Payne and to his heirs the said tract above described:

To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Simeon Payne and to his heirs and assigns forever.

In testimony whereof I, Franklin Pierce, President of the United States of America, have caused these letters to be made patent
109 and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the
[SEAL.] first day of May, in the year of our Lord one thousand eight hundred and fifty-four, and of the Independence of the United States the seventy-eight.

By the President:

FRANKLIN PIERCE,
By H. E. BALDWIN, *Ass't Sec'ty.*

Recorded, vol. 70, page 164, E.

J. N. GRANGER,
Recorder of the General Land Office.

STATE OF MISSOURI, }
County of Pettis, } *ss:*

I, F. Crandall, clerk of the circuit court and *ex officio* recorder of Pettis county, do certify that the annexed and foregoing instrument of writing (from the United States of America to Simeon Payne) was filed in my office for record on the 10th day of August, 1866, and duly recorded in Deed Book M, page 88 & 89.

Given under my hand, with the seal of the Pettis circuit
[SEAL.] court affixed, at office, in Sedalia, this 10th day of August, 1866.

F. CRANDALL,
Recorder of Pettis County.

To the introduction of which said patent in evidence plaintiff objected, for the reason that the same is irrevelant and does not
110 tend to establish any material fact at issue in this cause; which objection was by the court overruled and said patent read in evidence; to which ruling and action of the court the plaintiff then and there excepted at the time.

Defendants next offered and read in evidence a patent from the Government of the United States to Berry L. Greer for the N. W. ¼

of the N. W. ¼ of sec. 25, t'p 47, rng. 21, dated July 15th, 1854, which is in words and figures as follows:

B. L. Greer's Patent.

Certificate No. 37026.

United States of America to all to whom these presents shall come, Greeting:

Whereas Berry L. Greer, of Pettis county, Missouri, has deposited in the General Land Office of the United States a certificate of the register of the land office at Clinton, whereby it appears that full payment has been made by the said Berry L. Greer, according to the provisions of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the northwest quarter of the northwest quarter of section twenty-five, in township forty-seven, of range twenty-one, in the district of lands subject to sale at Clinton, Missouri, containing forty acres, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Berry L. Greer:

111 Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Berry L. Greer and to his heirs the said tract above described:

To have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Berry L. Greer, and to his heirs and assigns forever.

In testimony whereof I, Franklin Pierce, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed. Given under my hand, at the city of Washington, the fifteenth [SEAL.] day of July, in the year of our Lord one thousand eight hundred and fifty-four, and of the Independence of the United States the seventy-ninth.

By the President:

FRANKLIN PIERCE,
By H. E. BALDWIN, *As'y't Sec.*

Recorded, vol. 71, page 59, E.
JNO. GRANGER,
112 *Recorder of the General Land Office.*

STATE OF MISSOURI, } ss:
County of Pettis, }

I, J. D. Crawford, recorder of deeds within and for the county of Pettis and State aforesaid, do hereby certify that the above and foregoing instrument of writing was filed for record in my office on the

29th day of August, A. D. 1872, at 2 o'clock p. m., and has been duly recorded in Deed Record "U," on page 123.

Witness my hand and official seal, at office, in Sedalia, Pettis county, Missouri, the day and year aforesaid.

J. D. CRAWFORD, *Recorder*,
By CHARLES RACE, *D. R.*

113 *Pl'ff Obj. to Greer's Patent.*

To the introduction of which said patent and evidence plaintiff objected, because the same is irrelevant and does not tend to establish any material fact at issue.

Which objection was by the court overruled, and said patent was read in evidence; to which ruling and action of the court the plaintiff then and there duly *accepted* at that time.

Defendants next offered and read in evidence the copy of military bounty land warrant number 16907, the assignment thereof to A. C. Widdecombe, and the assignment by said Widdecombe to Wm. Sensenderfer, and the application of said Sensenderfer to locate said warrant upon the lands in controversy; which said warrant, assignments, and application are in words and figures as follows:

M. B. L. Warrant No. 16907. *Widdecombe to Sensenderfer.*

6. DEPARTMENT OF THE INTERIOR, T. W. E.
GENERAL LAND OFFICE, M. E. N. W.
WASHINGTON, D. C., *September 9th*, 1880.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed copies of military bounty land warrant No. 16907, issued to John Harris, for eighty acres, under the act of Congress of September 28th, 1850, and accompany-
114 ing papers on the location thereof in the name of William Sensenderfer, are a true and literal exemplification of the originals now on file in this office.

In testimony whereof I have hereunto subscribed my
[SEAL.] name and caused the seal of this office to be affixed at the city of Washington on the day and year above written.

J. A. WILLIAMSON,
Commissioner of General Land Office.

(*Copy of M. B. L. Warrant No.* 16907, 80 *Acres, Act* 1850.)

Bounty land. No. 16907. Bounty land.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
OFFICE OF THE COMMISSIONER OF PENSIONS.

It is hereby certified that under the act of September 28th, 1850, entitled "An act granting bounty land to certain officers and soldiers

who have been engaged in the military service of the United States," John Harris, private in Captain Willis' company, 2d Regiment Tennessee militia, war of 1812—eighty acres—is entitled to locate eighty acres at any land office of the United States, in one body, and in conformity to the legal subdivisions of the public lands, upon any of the public lands subject to entry at private sale.

Given under my hand and the seal of the Department this
115 10th day of October, eighteen hundred and fifty-nine.

[SEAL.] (Signed) J. E. HEATH,
Commissioner.

Copy of Endorsement on Warrant No. 16907.

For value received, I, Obadiah Harris, administrator of the estate of John Harris, deceased, pursuant to an order of the probate court of Cooper county, Mo., a certified copy of which is hereto attached, have and by these presents do hereby sell, convey, and assign the within warrant for eighty acres of land, issued to said John Harris, in his lifetime, to Albert C. Widdecombe, of the county of Cooper and State of Missouri; to have and to hold the same unto himself, the said Albert C. Widdecombe, his heirs and assigns forever, and hereby authorize him, the said —— to locate the same and receive a patent therefor in his own name.

Given under my hand and seal this 18th day of May, A. D. 1854.

(Signed) OBADIAH his x mark HARRIS,
[SEAL.] *Administrator of John Harris, Dec'd.*

Signed in the presence of—
JO. L. STEPHENS.
EDMUND SNODGRASS.

STATE OF MISSOURI, } ss:
County of Cooper, }

This day personally appeared before me, the undersigned, a notary public within and for the county and State aforesaid,
116 Obadiah Harris, administrator of the estate of John Harris, deceased, who is personally known to me to be the person whose name is subscribed to the above and foregoing sale and assignment of the within warrant, and the said Obadiah Harris acknowledged the same to be his act and deed for the purposes therein mentioned.

In testimony whereof I, the notary aforesaid, have hereunto set my hand and affixed my notarial seal, at office, in the city of Booneville, on this 18th day of May, A. D. 1854.

[NOTARIAL SEAL.]

JOSEPH L. STEPHENS,
Notary Public.

STATE OF MISSOURI, } ss:
County of Cooper, }

I, W. W. Talieferro, clerk of the circuit court in and for said county, do hereby certify that Joseph L. Stephens, before whom the foregoing certificate of acknowledgement was taken, was at that time a duly commissioned notary public in and for said county, as appears of record in my office, and that full faith and credit should be given to all of his official acts.

Witness my hand and seal of said court, at office, this 28th day of November, 1868.

[SEAL OF CLERK.] W. W. TALIEFERRO, *Clerk,*
By R. M. WHISTOW, *D. C.*

[5-cent rev. stamp.]

117 (*Copy of the Certified Copy of Order of Probate Court.*)

In the Probate Court in and for Cooper County, in the State of Missouri. April Term, 1854.

STATE OF MISSOURI, } ss:
County of Cooper, }

Be it remembered that at a probate court, opened, begun, and held at the court-house, in the city of Boonville, county of Cooper and State of Missouri, on Tuesday, April 13th, 1854, among other proceedings had by said court were the following, to wit:

In the Matter of the Estate of JOHN HARRIS, Dec'd.

And now, at this day, comes here into open court Obadiah Harris, administrator of the estate of John Harris, deceased, and on his motion, and it appearing to the court that at the time of the death of said John Harris he was owner of a certain certificate of
118 bounty land warrant No. 16907, for eighty acres, granted by the United States and issued by J. E. Heath, Commissioner of Pensions, in the name of John Harris, under date of October 10, 1857, in pursuance to the act of September 28th, 1850; and, the court being fully advised of and concerning the premises, it is ordered by the court that the said Obadiah Harris be, and he is hereby, authorized and directed to sell, as administrator as aforesaid, the said certificate of land warrant on the best terms, for cash in hand, at private sale, and that he make a report to this court of his acts and doings in the premises.

I, William R. Butler, judge and *ex officio* clerk of the probate court aforesaid, certify that the above and foregoing is a true and perfect copy of the order made by said court in relation to the matters therein contained as fully as the same now remain of record in my office.

Witness my hand and the seal of said court, at office, this 15th day of August, 1868.

(Signed) WM. R. BUTLER, *Judge.*

[5-cent rev. stamp.]

Widdecombe's Assignment to Sensenderfer.

Copy of indorsement on the certified copy of the order of the probate court.

For value received, I, Albert C. Widdecombe, to whom the attached warrant, No 16907, act of 1850, for 80 acres, was as-
119 signed, do hereby assign and convey the said warrant, unto William Sensenderfer, of Saint Louis county, Mo., and to his heirs and assigns forever, and authorize him to locate the same and receive a patent therefor.

Witness my hand and seal this — day of ——, 187–.

(Signed) ALBERT C. WIDDECOMBE.

Witness:

WM. H. WIDDECOMBE.

JNO. N. GOTT.

[5-cent rev. stamp.]

STATE OF MISSOURI, *Cooper County,* } ss:

On the 28th day of December, 1870, before me, the undersigned, clerk of the county court within and for the county and State aforesaid, personally came Albert C. Widdecombe, to me well known, and acknowledged the foregoing assignment to be his act and deed for the purposes therein mentioned, and I certify that the said Albert C. Widdecombe is the identical person to whom said warrant was assigned.

In testimony whereof I hereunto set my hand
[SEAL OF COURT.] and affix my seal of office the day and year first aforesaid.

(Signed) HENRY C. LEVENS,
Clerk Cooper County Court, Mo.

[5-cent rev. stamp.]

Sensenderfer's Application to Locate Wt # 16907.

(Copy of the application to locate warrant No. 16907.)

I, Wm. Sensenderfer, of St. Louis county, State of Missouri,
120 do hereby apply to locate, and do locate, the W. ½ of the N. W. ¼ (west half of northwest quarter) of section No. 24, in township No. 47, of range No. 21, in the district of lands subject to sale at the land office at Boonville, Mo., containing 80 acres, in satisfaction of the attached warrant, number 16907, issued under the act of 28 September, 1850.

Witness my hand this twenty-eighth day of December, A. D. 1870.
(Signed) WM. SENSENDERFER.

Attest:
E. G. EVANS, *Register.*
JNO. N. GOTT, *Receiver.*

I desire the patent to be sent to —.

To the introduction of which said warrant, assignment, and application plaintiff objected for the reason that the same was incompetent and irrelevant, in this, that the defendants by their answer admit that the plaintiff's patent give him the legal title to the land in controversy, and it is not competent to disprove that fact or to show any defects preliminary to the acquisition of said legal title.

Which objections were by the court overruled and said copies were read in evidence; to which action and ruling of the court the plaintiff then and there duly accepted at that time.

Defendants next offered and read in evidence the record of a mortgage from W. R. Kemp and wife to A. S. & W. N.
121 Walker, recorded in Book E, at page 410; which record is in words and figures as follows:

Mortgage. Kemp & Wf. to A. S. & W. N. Walker.

Know all men by these presents that we, William R. Kemp and Sarah G. Kemp, his wife, of Pettis county and State of Missouri, for and in consideration of the sum of five dollars to us in hand paid — A. S. Walker and William W. Walker, of Cooper county and State aforesaid, the receipt of which is hereby acknowledged, and the further consideration hereinafter mentioned, we have this day and by these presents do bargain, sell, and convey unto the said A. S. and W. W. Walker the lands hereinafter described, lying and being in said county of Pettis and State aforesaid, viz: The S. W. qr. of S.W. qr. of sec. No. 24, township No. 47, range No. 21; also the S. E. qr. of S. W. qr. of sec. No. 36, township No. 47, range 21, and W. ½ of N.W. qr. of sec. No. 24, town. 47, range 21, and the N. E. qr of the N. E. qr. of sec. No. 23, town. 47, range 21, and the E ½ of the N.W. qr. of sec. No. 25, town. 47, and range 21, and the N. ½ of the S. W. qr. of sec. No. 25, town. 47, and range 21, together with all and singular the right, title, and *and* privileges thereunto belonging or in anywise appertaining—

But upon the express conditions following:

Whereas I, the said William R. Kemp, executed two notes jointly with William Kemp, which were made payable to A. S.
122 Walker and Mary Maston, as executors of the estate of Isaac Maston, dec'd, one note for twelve hundred and sixty dollars $\frac{75}{100}$, dated March 25th, 1851, and due May 8th, 1851, and credited with two hundred dollars May 8th, 1851, and with forty dollars June 1st, 1851, and another note, dated March 12th, 1851, and made due one day after date, for five hundred and thirty-two dollars $\frac{25}{100}$;

And also whereas I, the said William R. Kemp, jointly with

Henry Small, executed a note to Henry R. Walker for one thousand and fifty dollars, dated September 11th, 1849, & due one day after date, which is credited with five hundred dollars April 1st, 1850; also two hundred dollars July 6th, 1851:

Now, if the above-described bonds or notes are not fully paid off within twelve months from the date of this instrument, then the aforesaid A. S. Walker and W. W. Walker or either of them are hereby fully authorized to sell the aforesaid lands, or so much thereof as may be necessary to pay said notes and interest that may be due or unpaid, at the court-house door, in Georgetown, Pettis county, and State of Missouri, to the highest bidder for cash in hand, having given thirty days' notice previously of such sale in some newspaper printed in the city of Boonville, and between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the day specified in such notice for said sale, and from the proceeds of said sale, after first paying all the expense in-
123 curred in carrying this instrument into effect, and then paying next the above-described note due to A. R. Walker, with all interest that may be due on the same, and then afterwards they, the said A. S. and W. W. Walker, shall pay the aforesaid notes executed and due to A. S. Walker and Mary Maston, executors of the estate of Isaac Maston, dec'd; and after paying all expense and the notes in the order, as above set forth, they shall hold or pay any balance of money that may remain in their hands to my order; and the said A. S. and W. W. Walker or either of them is hereby authorized to make a deed to purchaser or purchaser-of said lands, and all their acts in the premises we hereby authorize and confirm as fully and effectually as though we had done the same in our own proper person.

Given under our hands and seals on this 18th day of February, A. D. 1852.

WILLIAM R. KEMP. [SEAL.]
SARAH G. KEMP. [SEAL.]

STATE OF MISSOURI, } ss:
County of Pettis, }

Be it remembered that on this 18th day of February, in the year of our Lord one thousand eight hundred and fifty-two, personally appeared before me, the undersigned, justice of the peace for Pettis county, William R. Kemp and Sarah G., his wife, both
124 known to me to be the persons whose names are subscribed to the foregoing deed of conveyance, and acknowledged the same to be their own voluntary act. The said Sarah G. Kemp, being by me made acquainted with the nature and contents of said deed, saith and acknowled-th the same to be her own free voluntary act without any undue influence of her husband; and, further, that she willingly relinquishes all her right, title, and dower in all and singular*ly* the land specified in said deed to the only proper use and benefit therein stated.

Written and certified to the day and year above written.

NATH'L A. NEWBILL, *J. P.*

Filed March 8th, 1852.

To the introduction of said mortgage deed in evidence plaintiff objected, for the reason because the same is not a conveyance of which the plaintiff was bound to take notice, & the same cannot effect his rights herein, and because the same is not sufficient to convey any greater right than Wm. R. Kemp then had, and cannot in any way effect this case.

Which objection was by the court overruled and said record read in evidence.

To which ruling and action of the court the plaintiff then and there duly *accepted* at that time.

125 Defendants next offered and read in evidence the record of a deed by Anthony S. Walker to Wm. Kemp, dated December 20th, 1853, and recorded page 296, Book F, which is in words and figures as follows:

Deed of A. S. Walker to Wm. Kemp.

This indenture of bargain and sale, made and entered into on this 20th day of December, eighteen hundred and fifty-three, between Anthony S. Walker, of the first part, and William Kemp, of Pettis county and State of Missouri, of the second part, witnesseth:

That whereas heretofore, to wit, on the 18th day of February, 1852, William R. Kemp and Sarah G. Kemp, his wife, of said Pettis county and State of Missouri, executed and delivered to Anthony S. Walker and William W. Walker their deed of trust, by which they conveyed to said A. S. & W. Walker the following lands, tenements, &c., situated in Pettis county & State of Missouri, to secure the payment of certain sums of money mentioned in said deed of trust, to wit, the southwest quarter of the southwest quarter of section twenty-four; also the southeast quarter of southwest quarter of section thirty-six, and west half of n'west quarter of section twenty-four, and northeast quarter of northeast quarter of section twenty-three, and southeast quarter of southeast quarter of section fourteen, and east half of northwest quarter of section twenty-five, and north half of southwest quarter of section twenty-five, and all of said lands

126 are in township forty-seven and in range twenty-one, supposed to contain in all four hundred acres, which said deed of trust was duly acknowledged by the said William R. and Sarah G. Kemp and recorded in the recorder's office of Pettis county and State of Missouri; and whereas, after the time provided in said deed for selling said land, two of the debts therein named remaining unpaid, and being requested to make sale of same, the said A. S. and William W. Walker gave notice, in pursuance of the power vested in them, in the Boonville Observer, a newspaper published in the city of Boonville, that they would proceed to sell the said lands to the highest & best bidder for cash in hand at the court-house door in Georgetown, Pettis county & State of Missouri, on the 20th day of December, 1853, which said notice was published in said paper for more than thirty days prior to the 20th day of December, 1853; and whereas on the said 20th day of December, 1853, the said Anthony

S. Walker, in pursuance with said notice, offered the said lands for sale at the court-house door in Georgetown, county & State aforesaid, for cash to the highest bidder, when the said William Kemp became the purchaser of all the lands above mentioned for the sum of one dollar:

Now, in consideration of the premises and the payment of said sum of money bid for the said lands as aforesaid, I, Anthony S. Walker, in pursuance of the authority vested in me, do
127 grant, sell, and convey unto said William Kemp all of the right, title, and interest of the said William R. Kemp & Sarah G. Kemp as by the aforesaid deed of trust we were empowered to do (and no more) to the above-named lands:

To have and to hold to him, his heirs and assigns forever.

Witness my hand and seal this the day and year aforesaid.

ANTHONY S. WALKER. [SEAL.]

STATE OF MISSOURI, }
County of Cooper, } ss:

Be it remembered that on the seventh day of January, eighte-n hundred and fifty-four, before me, Henry C. Levens, clerk of the county court of Cooper county aforesaid, personally appeared Anthony S. Walker, to me personally known to be the person whose name is subscribed to the foregoing deed as a party thereto, and acknowledged that he executed the same for the purposes therein mentioned.

In testimony whereof I, the clerk aforesaid, have here-
[SEAL.] unto set my hand and affixed my seal of office, at office, in the city of Boonville, the day and year aforesaid.

HENRY C. LEVENS, *Clerk.*

128 STATE OF MISSOURI, }
County of Pettis, } ss:

I, R. R. Spedden, clerk of the circuit court and *ex officio* recorder of Pettis county, hereby certify that the foregoing deed was filed for record in my office Jan'y 14th, 1854, and duly recorded in Book "F," on page- 296 & 297.

[SEAL.] Given under my hand and seal of office, in Georgetown, this 16th day of January, A. D. 1854.

R. R. SPEDDEN, *Clerk.*

To the introduction of said record in evidence plaintiff objected for the reason given as to said mortgage, and for the reason that, taken with said mortgage, it is not sufficient to convey any title or interest without further proof of the facts which, under the terms of said mortgage, authorized a sale and the making of a deed, because said mortgage does not make the recitations in said deed evidence.

Which objection was by the court overruled and the said record read in evidence.

To which ruling and action of the court the plaintiff then and there duly accepted at that time.

The defendants next offered and read in evidence the record of a deed from Wm. Kemp to W. D. Cummings, dated February
129 18th, 1868, and recorded January 28th, 1869, in Warranty Deed Record Book 2, page 596, which deed is in words and figures as follows:

Deed. Wm. Kemp to W. D. Cummings.

Know all men by these presents that I, William Kemp, of the county of Pettis, in the State of Missouri, have this day, for and in consideration of the sum of twelve hundred dollars to the said William Kemp in hand paid by W. D. Cummins, of the county of Pettis, in the State of Missouri, granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said W. D. Cummins the following-described tracts or parcels of land, situated in the county of Pettis, in the State of Missouri—that is to say: The west half of the northwest quarter of sec. twenty-four, township forty-seven, & range twenty-one, containing eighty acres, more or less:

To have and to hold the premises hereby conveyed, with all the rights, privileges, and appurtenances thereto belonging or in anywise appertaining, unto the said W. D. Cummins, his heirs and assigns forever, I, the said William Kemp, hereby covenanting to and with the said W. D. Cummings, his heirs and assigns, for himself, his heirs, executors, and administrators, to warrant and defend the title to the premises hereby conveyed against the claim of every person whatsoever.

130 In witness whereof I have hereto subscribed *have* name and affixed my seal this 18th day of February, 1868.

his
WILLIAM x KEMP.
mark.

STATE OF MISSOURI, } ss:
County of Pettis, }

Be it remembered that William Kemp, who is personally known to the undersigned, a justice of the peace within and for said county, to be the person whose name is subscribed to the foregoing deed as a party thereto, this day appeared before me and acknowledged that he executed and delivered the same as his voluntary act and deed for the uses and purposes therein contained.

Given under my hand this 18th day of February, 1868.

T. W. PHILLIPS, *J. P.*

This deed was filed for record 28th day of January, A. D. 1869, at the hour of 10 o'clock 30 m. a. m.

F. CRANDALL, *Recorder.*

To the introduction of said deed *and* evidence the plaintiff objected, for the reason *the same* as to said above-mentioned mortgage and deed of said Walker to Wm. Kemp under said mortgage; which

objection was by the court overruled and said evidence —; to which ruling and action of the court the plaintiff then and there duly excepted at that time.

131 Defendants next offered and read in evidence a deed from W. D. Cummins to W. T. Kemp, dated January 26th, 1869, recorded January 28th, 1869, in Warranty Deed Record Book 2, at page 597, which is in words and figures as follows:

Deed. W. D. Cummings to Wm. T. Kemp.

Know all men by these presents that we, W. D. Cummins and Harriet I., his wife, of the county of Pettis, in the State of Missouri, have this day, for and in consideration of the sum of eighteen hundred and forty dollars to the said W. D. Cummins in hand paid by William T. Kemp, of the county of Pettis, in the State of Missouri, granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said William T. Kemp the following-described tracts or parcels of land, situate in the county of Pettis, in the State of Missouri, that is to say: The west half of the northwest quarter of section twenty-four, in township forty-seven, and in range twenty-one, containing eighty acres, more or less:

To have and to hold the premises hereby conveyed, with all the rights, privileges, and appurtenances thereto belonging or in anywise appertaining, u-to the said William T. Kemp, his heirs and assigns forever, I, the said W. D. Cummins, hereby covenant-

132 ing to and with the said Wm. T. Kemp, his heirs and assigns, for myself, my heirs, executors, and administrators, to warrant and defend the title to the premises hereby conveyed against the claim of every person whatsoever.

In witness whereof we have hereto subscribed our names and affixed our seals this 26th day of January, 1869.

W. D. CUMMINS. [SEAL.]

her
HARRIET I. x CUMMINS. [SEAL.]
mark.

[$2 rev. stamp.]

STATE OF MISSOURI, } ss:
County of Pettis, }

Be it remembered that W. D. Cummins and Harriet J., his wife, who are personally known to the undersigned, a justice of the peace within and for said county, to be the persons whose names are subscribed to the foregoing deed as parties thereto, this day appeared before me and acknowledged that they executed and delivered the same as their voluntary act and deed for the uses and purposes therein contained; and the said Harriet J., being by me made acquainted with the contents of said deed, acknowledged, on an examination apart from her said husband, that she executed the same and relinquishes her dower in the real estate therein mentioned freely and without compulsion or undue influence of her said husband.

133 Given under my hand this 26th day of January, 1869.

T. W. PHILLIP,
Justice of the Peace.

This deed was filed for record this 28th day of January, A. D. 1869, at 12 o'clock and 10 minutes p. m.

F. CRANDALL, *Recorder.*

To the introduction of such record in evidence plaintiff objected for the reason given as to the above-mentioned mortgage & said deeds.

Which objection was by the court overruled and said record read in evidence.

To which ruling and action of the court the plaintiff then and there duly excepted at the time.

Plaintiff here admits that he paid no taxes on the land in controversy prior to his entry thereof.

Tax Books Offered & Read by Def'ts.

Defendants next offered and read in evidence from the tax books of Pettis county, Missouri, as follows:

Tax book of 1871, at page 102, showing that the west half of the northwest quarter of section 24, township 47, range 21, was assessed to W. T. Kemp and the taxes due thereon were marked paid by him November 22nd, 1871; also from the tax books of 1872, at page 97, showing said tract assessed to W. T. Kemp and paid by him
134 December 31, 1872; also from said tax book for the year 1873, at page 100, showing said tract as assessed to W. T. Kemp and the taxes paid by him November 22nd, 1873, & also tax book of 1870, showing land in controversy assessed to Wm. T. Kemp and taxes thereon paid by him on Dec. 31, 1870.

To the introduction of said portion of said tax book in evidence plaintiff objected, for the reason that said evidence was irrelevant and incompetent and because said record was not the best evidence of the payment of taxes by said Kemp on said land.

Which objections were by the court overruled and said record read in evidence.

To which ruling and action of the court the plaintiff then and there duly excepted at that time.

Petition of J. A. C. Brown, Collector.

The defendants next offered and read in evidence the petition in the case of J. A. C. Brown, collector, against Kemp, Sensenderfer *et al.* on a tax bill for the taxes of 1874, 1875, 1876, and 1877, which petition was filed July 14th, 1879.

Which said petition shows that the taxes of 1874, '5, '6, & '7 on this land are unpaid.

Defendants next offered and read in evidence a certified copy of the tax books of Pettis county, Missouri, concerning the land
135 in controver-y, which is by consent used instead of the whole tax book, which is in words and figures as follows:

Abstract from Tax Books.

Abstract from tax books of Pettis county, Missouri, showing to whom the W. ½ of the N. W. quarter of section 24, t'w'p 47, range 21, was assessed for the years mentioned.

Years.	
1857.	William Kemp.
1860.	William Kemp.
1861.	William Kemp.
1862.	William Kemp.
1863.	William Kemp.
1864.	William Kemp.
1865.	William Kemp.
1866.	William Kemp.
1867.	William Kemp.
1868.	William R. Kemp.
1869.	W. D. Cummins.
1870.	W. T. Kemp.
1871.	W. T. Kemp.
1872.	W. T. Kemp.
1873.	W. T. Kemp.
1874.	W. T. Kemp.
1875.	W. T. Kemp's estate.
1876.	W. T. Kemp's estate.
1877.	W. T. Kemp's estate.
1878.	W. T. Kemp's estate.
1879.	W. T. Kemp's estate.

136 STATE OF MISSOURI, } ss:
County of Pettis, }

I, H. Y. Field, clerk of the ceunty court of Pettis county, Mo., certify that the foregoing is a true statement taken from the tax books remaining in my office, showing to whom the W. ½ of the N. W. ¼ of section 24, township 47, range 21, was assessed for the several years mentioned; and I further certify that after making diligent search I have not been able to find any other tax books remaining in my office for any other years other than those mentioned in said abstract.

In testimony whereof I have hereunto set my hand and affixed the seal of the Pettis county court, at my office, this 10th day of Feb'y, 1881.

H. Y. FIELD,
County Clerk.

Def't- Rest.

Defendants here rest their case.

Plaintiff in rebuttal, to support the issues on his part, offered evidence as follows:

Plaintiff offered and read in evidence the deposition of W. H. Widdecombe, which is in words and figures as follows:

Depositions of witnesses produced, sworn, and examined on the 21st day of December, A. D. 1880, between the hours of eight
137 o'clock in the forenoon and six o'clock in the afternoon of that day, at the office of R. W. Whitlow, a notary public, in the city of Boonville, county of Cooper, and State of Missouri, in a certain cause now depending in the circuit court for the county of Pettis, in the State of Missouri, between William Sensenderfer, plaintiff, and Samuel A. Kemp and others, defendants, on the part of the plaintiff.

Deposition of W. H. Widdecombe for Pl'ff.

W. H. WIDDECOMBE, of lawful age, being produced, sworn, and examined on the part of the plaintiff, deposeth and saith:

I reside in the city of Boonvile, Cooper county, Missouri. I am a clerk by profession. I was in Pettis Co., Mo., in the spring of 1871, engaged in soliciting applications for patents to lands. I think it was in the latter part of March or first of April that I was in Pettis Co. I was not acquainted with the plaintiff, Wm. Sensenderfer, up to that time, nor for some months afterwards. While I was in Pettis Co. rec'd a letter from plaintiff requesting me to go to the recorder's office and see who certain lands in Pettis county were assessed to. There were some seven or eight tracts that he wrote me to look at, and among these tracts were the lands in controversy in this suit, which I found were assessed to the heirs of some Kemp; have forgotten the other name. There was nothing in this letter indicating who owned this land in controversy. Before I got this letter
138 Mr. Sensenderfer I had been in the county some time, and I called on Mr. Kemp before receiving this letter from the plaintiff, as I had quite a number of tracts of land on my book belonging to Mr. Kemp and the Kemp estate. I went to see him to see if he would employ me to get patents for these lands. He procured all the information I had necessary to get the patents, but declined to employ me, saying that Menton Thompson done all such business as that for him. This was my first acquaintance with defendant.

The next time I called on him was not a great while afterwards. I was in the neighborhood and called on him & talked to him about the tract of land in controversy, and at that time he overhauled all his old papers to see if he could find any evidence of title to this land in controversy. At this time I was looking after this matter for the plaintiff, and had his duplicate receipt for this land

in my possession, and exhibited the same to him. The defendant found nothing among his papers as any evidence of title to this land. I was never in Pettis county prior to the spring of 1871 engaged in any business whatever.

Cross-examined:

I have been in Boonville off and on since 1868; this was my home during that time. I commenced soliciting applications for patents in 1871, in Pettis Co. This was my first experience.

139 Prior to spring of 1871 was not engaged in any special business. I had an abstract of all the land in Pettis county where the patents — not procured by the parties who entered the same. I then went to the records of the county and obtained the names of the present owners of such lands. I then went to see them to see if they would employ me to procure the patents. I made up this abstract myself, at the U. S. land office in Boonville, Mo. I did this in the year 1870—at various times; it took four or five months, or, perhaps, more altogether. I did not work consecutively; it extended over a greater portion of the year. Prior to that time I had not been in the habit of being about the land office at Boonville. I never saw Mr. Sensenderfer at any time about the land office while I was making this abstract, and did not know that plaintiff was in the habit of examining the land office records for the purpose of entering lands.

Plaintiff did not know at that time that I was getting up this abstract, nor any one except my brother, A. C. Widdecombe.

The plaintiff was referred to me while in Pettis county by my brother. I fix the date of my visit to Pettis county because I know I was there six or seven months prior to going to Saline Co., where I remained three or four years, and I went to Saline in the fall of 1871. I tried to find some memorandum to fix the exact date, but have been unable to do so.

140 I think the first person I did business with in Saline was Jno. R. Strother. I also got a patent for Samuel Davis, and also Sappingtons, Marmadukes, Ben. Haupe, and others. I burnt up the letter from plaintiff; also abstract and other memorandums relating to these matters. I think plaintiff's letter was written from Boonville. I did not see the land in controversy. It was parties that I was looking after, not lands. I communicated to plaintiff the result of my interview with Mr. Kemp. The first time I was at Mr. Kemp's was in cold weather, and the last time I was there was warm weather, which was about two months between the two visits. I commenced operation in Pettis county about the last of March or first of April, in 1871.

After I went to Saline I never went back to Pettis to do any more business, except to procure two or three patents just over the Saline Co. line; never saw Mr. Kemp after I went to Saline Co. Kemp said nothing to me about any one being in possession of the land in controversy, nor any one having entered it. I did not see any of the other parties plaintiff had written about. I found the records so

clear that I did not deem it necessary. Whenever I found in my business any land assessed to an estate I always went to the adm'r or other person in charge of same, to whom it was assessed, and my recollection is that the land in controversy was as-
141 sessed to the representatives of the Kemp estate, and the title to this land was different in this respect from the other land.

Plaintiff never stated to me at any time that there was other parties claiming this land. At the time of my first visit to Mr. Kemp I had no knowledge or acquaintance with plaintiff and made the first visit to Kemp on my own business, and my second visit to Mr. Kemp was made in consequence of having received the letter from plaintiff. I communicated — my letter, I think, to plaintiff the information I gathered from Mr. Kemp. I wrote to plaintiff at Boonville.

Redirect:

In the plaintiff's letter to me he did not request that I should go and see the land, but examine the records as to any adverse title.

WM. H. WIDDECOMBE.

Subscribed and sworn to before me on the day, at the place, and within the hours first aforesaid.

R. W. WHITLOW,
[SEAL.] *Notary Public.*

The plaintiff next offered and read in evidence an exemplification of a patent from the United States to W. R. Kemp for the W. ½ of the N. W. ¼ of section 25, t'p 47, rng. 21, dated June 1st, 1850, which is in words and figures as follows:

142 16340, B. DEPARTMENT OF THE INTERIOR, H. K. W.
GENERAL LAND OFFICE, S. W. C.
WASHINGTON, D. C., *June* 19, 1880.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed copy of patent in favor of William R. Kemp, founded on warrant No. 1384, for 160 acres, act of 1847, is a true and literal exemplification from the record in this office.

In testimony whereof I have hereunto subscribed my
[SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

J. A. WILLIAMSON,
Commissioner of General Land Office.

Wm. R. Kemp's Patent, Founded on Wt 1384.

The United States of America to all to whom these presents shall come, Geeeting:

Know ye that, in pursuance of an act of Congress entitled "An act to raise for a limited time an additional military force, and for other purposes," approved February 11th, 1847, Thomas W. Hendley, late a

private in Captain Snead's company, First Regiment Tennessee Cavalry, having deposited in the General Land Office a warrant in his favor, numbered 1384, there is therefore granted by the United
143 States unto William R. Kemp, assignee of N. G. Powell, who was assignee of said Thomas W. Hendley, and to his heirs, the southeast quarter of the southeast quarter of section fourteen, the northeast quarter of the northeast quarter of section twenty-three, and the west half of the northwest quarter of section twenty-five, in township forty-seven north, of range twenty-one west, in the district of lands subject to sale at Clinton, Missouri, containing one hundred and sixty acres, according to the official plat of the survey of said land returned to the General Land Office by the surveyor general, which said tracts have been located in satisfaction of the above-mentioned warrant in pursuance of the act of Congress above mentioned, approved February 11th, 1847:

To have and to hold the said parts of said sections of land, with the appurtenances thereof, unto said William R. Kemp and to his heirs and assigns forever.

In testimony whereof I, Zachary Taylor, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of June, in the year of our Lord one thousand eight hundred and fifty, and of the Independence of the United States the seventy-fourth.

By the President: Z. TAYLOR,
By THO. EWING, JR., *Secretary.*

N. SARGENT,
Recorder of the General Land Office.

144 Plaintiff next offered and read in evidence a copy of the original application of W. R. Kemp to locate military bounty land warrant No. — on said W. ½ N. W. ¼ 25, 47, 21, and other lands; which said certified copy is in words and figures as follows:

16340, B. DEPARTMENT OF THE INTERIOR. H. K. M.
GENERAL LAND OFFICE, *June* 19, 1880. S. W. C.

I, J. A. Williamson, Commissioner of the General Land Office, do hereby certify that the annexed copy of William R. Kemp's application to locate warrant No. 1384, for 160 acres, act of 1847, is a true and literal exemplification from the files in this office.

In testimony whereof I have hereunto subscribed my
[SEAL.] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

J. A. WILLIAMSON,
Commissioner of the General Land Office.

W. R. Kemp's Application to Locate W't 1384.

I, William R. Kemp, of Pettis county, Mo., hereby locate the S. E. ¼ of the S. E. ¼ of section No. 14, the N. E. ¼ of the N. E. ¼ of sec-

tion No. 23, & the W. ½ of the N.W. ¼ of section No. 25, in township No. 47, of range No. 21, containing one hundred and sixty acres, in satisfaction of the within warrant.

WILLIAM R. KEMP.

June 13th, 1848.

145 Attest:
W. WATSON, *Register.*
DAN'L ASHBY, *Rec'r.*

LAND OFFICE, CLINTON, MO., *July* 31*st*, 1848.

We certify that the above location is correct, being in accordance with law and instructions.

W. WATSON, *Register.*
DAN'L ASHBY, *Rec'r.*

Plaintiff next offered and read in evidence a certified statement from the office of the register of lands for the State of Mo. as to the entry of the W. ½ of the N. W. ¼ of sec. 25, t'p 47, rng. 21; which certified statement is in words and figures as follows:

Abstract of Land Sold at the Land Office at Clinton, Mo., from the 1st Day of March, 1848, to the 28th Day of February, 1849, Inclusive.

1848.	Names.	Acres.	100ths.	Description.	Sec.	T'p.	Range.
	* *	*	*	*	*	*	*
	* *	*	*	*	*	*	*
June 13th	William R. Kemp....	80	00	W. ½ N. W....	25	47	21
	* *	*	*	* *	*	*	*
	* *	*	*	* *	*	*	*

STATE OF MISSOURI,
OFFICE OF REGISTER OF LANDS.

I, Jas. E. McHenry, register of lands for the State of Mis-
146 souri, certify *that* the foregoing entry to be correctly copied from a record of a report of lands sold at the U. S. land office in Clinton, Mo., from March 1st, 1848, to February 28th, 1849, as the same is recorded in Book No. 8 of the record of sales of United States lands now on file in this office.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said office, at the city of Jefferson, this 29th day of September, 1879.

JAS. E. McHENRY,
Register of Lands.

To the introduction of which said copy in evidence the defendants objected for the reason —.

Papers and Record Entries from U. S. Cir't C't.

The plaintiff then offered and read in evidence papers and record entries in Pettis circuit court and transcript from the United States circuit court in case of William Sensenderfer *vs.* Wm. T. Kemp, which shewed that Wm. Sensenderfer filed his petition against Wm. T. Kemp in Pettis circuit court on April 14th, 1873; that the same was an action in ejectment to recover the same lands in controversy in this suit; that on May 5, 1873, the defendant, Wm. T. Kemp, filed an answer and a motion for costs; that on September 1st, 1873, defendant, Wm. T. Kemp, filed an amended answer; that on
147 September 27th, 1873, leave was granted plaintiff to plead to the answer in sixty days after term; that on January 2d, 1874, plaintiff demurred to the answer; that in May 16th, 1874, the case was continued by consent; that on January 15th, 1875, the death of defendant was suggested; that on May 28th, 1875, the following entry was made of record:

WILLIAM SENSENDERFER
against
W. T. KEMP.

Now, at this day, a writ of summons is ordered for Martha J. Kemp, widow; Samuel A. Kemp, Ida Bell Kemp, James W. Kemp, and William R. Kemp, his heirs, to revive against party defendants.

That on September 6th, 1875, the following entry was made of record:

WILLIAM SENSENDERFER
against
JAMES W. KEMP, Adm'r of Wm. T. Kemp, Dec'd, *et al.*

Now, at this day, come James W. Kemp, adm't'r, *et al.*, and file their answer herein.

Which said answer is substantially the same as that herein except as to the parties defendant.

148 That on September 7th, 1875, the following entry was made of record:

Pet. & Bond for Removal to U. S. Court.

WILLIAM SENSENDERFER
against
JAMES KEMP, Adm't'r of the Estate of Wm. T. Kemp, Dec'd.

Now, at this day, come the plaintiff, by his attorney, and files his petition and bond for a removal of this cause to the United States court for the western district of Missouri.

That on the 7th day of September, 1875, the following entry was made of record:

New Bond. Filed and Cause Ordered to U. S. C't.

WILLIAM SENSENDERFER
against
JAMES T. KEMP, Adm'r of the Estate of Wm. T. Kemp, Dec'd.

Now, at this day, the bond heretofore filed for $250.00 is withdrawn and — now files a new bond for $500.00.

It is ordered by the court that the clerk of this court make out a full, true, and complete transcript of all the papers and proceedings in this cause and transmit the same to the United States district court for the western district of Missouri.

That afterwards the following proceeding- were had and the following entries were made of record in the United States
149 circuit court for the western district of Missouri, to wit:

And afterwards, at a regular stated term of the circuit court of the United States for the western district of Missouri, begun and held on the third Monday of November, A. D. 1875, at Jefferson City, in said district, the following proceedings were had in said cause on the 15th day of November, in said last-mentioned year, to wit:

WILLIAM SENSENDERFER
vs.
JAMES T. KEMP, Adm'r, *et al.*

This day come the defendants, by their attorneys, Philips & Vest, and filed herein a motion to remand this case to the circuit court of Pettis county, Missouri.

And said motion so filed is in words and figures as follows, to wit:

Motion of Def'ts to Remand to Pettis Cir. C't.

In "the Circuit — of the United States," Western District of Missouri.

WILLIAM SENSENDERFER
against
JAMES T. KEMP, Administrator of Wm. T. Kemp, and Other Defendants.

Now, at this day, come the defendants, by their attorneys, and move the court to dismiss this action or remand the same to the circuit court of the county of Pettis, State of Missouri, for the following reasons:

150 First. Because the said action was improperly transferred from the said circuit court of Pettis county, Missouri, to this court.

Second. Because this court has not jurisdiction of the said cause of action, the same being a naked action of ejectment for the

recovery of a tract of land in said county, and the said cause of action did not arise under the Constitution or laws of the United States as contemplated by the act of Congress authorizing the transfer of causes from the State to the Federal courts.

Third. Because the petition upon which this cause was transferred to this court is insufficient and does not show upon its face the existence of the facts authorizing such transfer.

PHILIPS & VEST,
Attorneys for Def'ts.

And afterwards, at a regular stated term of said circuit court, begun and held on the third Monday in April, 1876, at the place aforesaid, the following further proceedings were had on the 22d day of April, A. D. 1876, to wit:

WILLIAM SENSENDERFER
vs.
J. T. KEMP *et al.*

This day come the parties, by their attorneys, and the motion to remand filed herein is thereupon argued and submitted to the court.

151 And afterwards, at said last-mentioned regular term of said circuit court, begun and held as aforesaid, the following further proceedings were had in said case on the 24th day of April, 1876, to wit:

Mo. to Remand Overruled.

WILLIAM SENSENDERFER
vs.
J. T. KEMP *et al.*

This day come the parties, by their attorneys, and the motion to remand this cause having been heretofore submitted to the court, on consideration thereof it is ordered that the same be overruled, and said plaintiff thereupon files reply.

It is further ordered that defendants file bill in equity herein within sixty days, and that plaintiff enter his appearance thereto at next rule day after filing same, and case continued.

It is further ordered that a copy of said bill be served on plaintiff's attorneys of record at the time of filing.

Said reply so filed as aforesaid cannot be found among the files.

And afterwards, at a regular stated term of said circuit court, begun and held on the third Monday of November, 1876, at the place aforesaid, the following further proceedings were had in said cause on Nov. 21st, 1876, to wit:

152 WILLIAM SENSENDERFER
vs.
JAMES T. KEMP *et al.*

This day comes the defendant-, by Messrs. Vest and Gantt, and file a stipulation, signed by counsel, that this cause be continued, and thereupon it is ordered that this cause be continued.

Said stipulation so filed as aforesaid is in words & figures as follows, to wit:

Argreement to Continue.

In the United States Circuit Court, Western District of Missouri.
Nov. Term, 1876.

WILLIAM SENSENDERFER, Plaintiff,
against
JAMES KEMP, Adm'r of William T. Kemp, *et al.*, Defendants.

It is hereby stipulated and agreed by and between the counsel in the above-entitled cause, & also in case of William T. Kemp *vs.* William Sensenderfer, case 737, that said causes shall, by consent, stand continued generally at the November term, 1876, of the United States circuit court, western district of Missouri.

PHILIPS, VEST & GANTT,
Att'ys f. Kemp & Others.
SNODDY & SHORT & L. L. BRIDGES,
Att'y- for Wm. Sensenderfer.

153 And afterwards, at a regular stated term of said circuit court, begun and held on the third Monday, the 16th day, of April, 1877, at the place aforesaid, the following further proceedings were had in said cause on said day, to wit:

Def't Withdraws Ans.

WILLIAM SENSENDERFER
vs.
JAMES T. KEMP *et al.*

This day comes the defendant, by John F. Philips, Esq., his attorney, and by leave of court withdraws the answer heretofore filed herein, and by further leave files amended answer.

And said answer so filed as aforesaid is in words and figures following, to wit:

Amended Answer.

In the Circuit Court of the United States for the Western District of Missouri.

WM. SENSENDERFER, Pl'ff,
against
JAMES T. KEMP, Adm'r of the Estate of Wm. T. Kemp, *et al.*

Now, at this day, come the defendants, and for answer to the petition of plaintiff deny each and every material allegation of the petition, and, having fully answered, demand judgment that the plaintiff take nothing by his said petition, &c.

PHILIPS & VEST, *For Def'ts.*

154 And afterwards, at said last-mentioned term of said circuit court, the following further proceedings were had on the 1st day of May, 1877, to wit:

Continued at Pl'ff's Costs.

WILLIAM SENSENDERFER
vs.
JAMES T. KEMP *et al.*

Ordered, that this cause be continued until the next term, and that the plaintiff pay the costs of this continuance.

And afterwards, at a regular stated term of said circuit court, begun and held on the third Monday of November, 1877, at the place aforesaid, the following further proceedings were had in said cause on the 23d day of November, 1877, to wit:

Dismissed at Pl'ff's Cost.

WILLIAM SENSENDERFER
vs.
JAMES T. KEMP, Adm'r.

This day comes the plaintiff, by James S. Botsford, Esq., and dismisses this cause; whereupon it is ordered that the defendant go hence without day and recover his costs herein, and that [execution issue against the said plaintiff and his sureties for costs therefor.

Papers and Record Entries in Pettis Cir. Ct.

Plaintiff also offered and read in evidence papers and record entries in the case of William Sensenderfer *vs.* Samuel A. Kemp, Ida Bell Kemp, James W. Kemp, and Martha J. Kemp, in
155 Pettis circuit court, which showed that William Sensenderfer filed his petition in said court on August 13th, 1877,

and that the same was an action in ejectment against Samuel A. Kemp *et al.* to recover the land in controversy in this suit; that on September 8th, 1877, leave was granted to defendants to plead during the second week of the term; that on September 21st, 1877, by consent, the answer of Martha A. Kemp was filed; that on Jan'y 24th, 1878, the case was continued by consent; that on May 17th, 1878, an amended answer was filed; that on September 9th, 1878, John G. Sloan was appointed guardian *ad litem* for the minor defendants; that on September 9th, 1878, guardian *ad litem* filed answer; that on September 14th, 1878, the case was continued, by consent, to be tried in January, 1879; that on May 5th, 1880, the case was dismissed by plaintiff at his costs.

Plaintiff next offered and read in evidence a certified copy of a letter from the acting Commissioner of the General Land Office to the register at Plattsburg, Mo., which certified copy is in words and figures as follows:

B. C. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 31, 1880.

I, J. A. Williamson, Commissioner of the General Land
156 Office, do hereby certify that the annexed copy of a letter from this office to the register of the district land office at Plattsburg, Mo., dated May 22, 1855, is a true and literal exemplification of the original as of record in this office.

In testimony whereof I have hereunto subscribed my name and
[SEAL.] caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

J. A. WILLIAMSON,
Commissioner of General Land Office.

Letter from Com'r to Reg'r at Plattsburg.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 22, 1855.

Register, Plattsburg, Mo.

SIR: As my letter to yourself and the receiver of the 28th of February last, respecting the operations of your office, may not be deemed sufficiently explicit in reference to some of the points presented in your letter of the 30th Nov., 1854, & 27th of February, 1855, respectively, I would further state that the authority conferred upon you by law to administer oaths cannot be delegated by you to your "sworn clerk" or to any other person, but rests solely in you as
register, and the affidavits referred to which were made before
157 your clerk during your absence and the sickness of the receiver in November last are null and void, but it will be necessary, as suggested by you, to procure in each case a proper affidavit in the form required by the circulars of the 30th of October,

1854, & May 1st, 1855, to be filed with the certificate of purchase in this office. Upon re-examining your letter of 27th February last I am led to believe from your statement that you have not only been in the habit of filling up the affidavits of parties applying to enter land under the graduation act, but also of signing their names to the same. If this be true, it is a matter of surprise how you could have fallen into so great an error. I should have supposed that the impropriety of such a course would have at once struck your mind, and that such an affidavit could have no binding force upon the person who made it. The affidavit in every instance must be subscribed by the affiant himself, and in every case where this has not been done you will require a proper legal affidavit to be made, to be substituted for the illegal one.

You also appear to be laboring under a misapprehension in supposing the application of a purchaser to be a mere matter of form. Such is not the fact. By the act of Congress approved February 24th, 1810, "every person making application at any of the land offices of the United States for the purchase at private sale of
158 a tract of land is required to produce to the register a memorandum in writing describing the tract which he shall enter by the proper number of the section, half section, or quarter section (as the case may be), & of the township and range, subscribing his name thereto, which memorandum the register shall file and preserve in his office."

Such written application forms the foundation of every entry, and is made to govern in all cases in deciding the question as to what particular tract of land was entered, and under no circumstances is it admissible to alter in any manner the affidavit and application of the purchaser. The filling up of the application is no part of the official duty of the register or receiver. If requested to do so, you may fill up the application, but when signed by the applicant it becomes his own act, and he alone is responsible for any errors that may exist therein. The affidavit of Mr. Miller, which accompanied your letter of the 27th of Feb. ult., as it agrees with his application, has been filed with the appropriate certificate of purchase, but you will in future avoid making a similar error.

Very respec'ly your ob't s'v't, JOS. S. WILSON,
Acting Commissioner.

159 *Testimony of Wm. Sensenderfer for Pl'ff.*

WILLIAM SENSENDERFER, the plaintiff, being produced, sworn, and examined, testified as follows:

I am the plaintiff. I am 36 years old. I went to Boonville in the fall of 1870. I came to Pettis Co. for the first time in September, 1871. I had entered these lands and got my patent before that time. I knew nothing of the condition or character of the land before I came to this Co., except that which was shown by the books and records at the land office at Boonville. These records showed that the land in controversy was vacant. I found out that it was

vacant from the tract book at Boonville. I was living at Boonville then; moved there in the fall of 1870; had been there only a few months when I made the entry; when I found that this land was vacant I entered it; when I made the entry I knew nothing of the settlement of Pettis Co. or the neighborhood of this land. In the land office they have plats showing the timber land and prairie land. When I found a tract was vacant I examined this plat book to ascertain the character of the land, as to whether it was timber or prairie. I mean I looked over this plat book to see if it was favorable. If I thought it favorable I located it. I made all my locations blind, never having seen any of the land. I *I* made my entries on the information obtained from these tract books and plat books; only knew from the plat books what sort of land
160 it was. I never saw any of the land before I entered it, or had any account of it from any one; never asked anybody about it. The first information I had of any conflicting or adverse claim to this land was on the fifth day of April, 1871, which I received from W. H. Widdecombe. He reported to me in person on that day, when he came. He came back from a trip through Pettis county. I thought his brother, A. C. Widdecombe, mailed him a list of my entries in Pettis Co. to his address, at Sedalia. In March, 1871, I wrote him a letter telling him if he got in the neighborhood of my locations and the lands, the numbers of which I enclosed in the letter, to view them and report to me when he returned as to how the land lay and what he thought of the land. I was anxious to know my success in these locations. I wanted him to find out and advise me how the land lay and whether it was good or not. When he returned to Boonville he came to my boarding-house after dinner and reported as to this piece of land. He said he was at old man Kemp's. I asked him for Kemp's given name, and he said it was Wm. T. Kemp, and he told me that he had told old man Kemp that he was to view a certain tract of land in his neighborhood, and that he gave Kemp the numbers of the land, and he said that Kemp told him that it was lying outside of his big farm, and that it was all prairie, and the land had been
161 entered many years ago. He told me that he told Kemp that he knew nothing about that; that he was requested by the locator to view the land, and he said that the old man Kemp marked on the ground and showed him how the land lay. I then suggested that we go to the land office and see if we could find Kemp's entry. We went to the land office and found Kemp's location. We found it in section 14, 23, and 25, and this was the first time I ever noticed Kemp's location. This conversation was in April, 1871. I never learned that this land was in the possession of any one until I came to Sedalia, in September, 1871. The first acquaintance that I made in Sedalia was M. M. Lampton. He told me about having entered the Swisher tract. I then went to the assessor's office and found out that one W. T. Kemp claimed it. After that I went to Thompson's office and got some money. I learned nothing from him; had no conversation with him then about this land. I did have a talk with him in September

or October, 1872. I went from here—having been here several days—to Clinton. I saw O'Geary after my return. I went from Clinton to Osceola, and from there to Greenfield, looking after lands which I had bought and entered together; went from there to Carthage, where I had some lands; was there several days; then came north, on the west tiers of counties, to Butler. All of this took twelve or thirteen days; then went to Clinton;
162 then came to Calhoun; then to Windsor, the same evening; stopped at the hotel over night. I arrived in Windsor after dark; next morning I met O'Geary for the first time, and engaged him to take me out to Maj. Neill's. I did not know the way. All I knew of the country was by the numbers of the sections, and by these we worked our way across to Maj. Neill's, in Johnson Co. Going out there I had no conversation with O'Geary about land matters. The first conversation we had about lands was at Neill's. I had been to Warrensburg previous to this, and learned while there that two of my entries in Johnson Co. were claimed by other parties. While at Sedalia I learned that all the lands I had entered in Pettis county were claimed by others. I had three tracts in Johnson Co. When at Warrensburg I learned that the entry near Neill's was claimed by him. The visit to Neill's was in the latter part of September or the first of October, 1871. I told Neill I had entered 3 fort*y*s there, and gave him the numbers of the land. He said they lay south and southeast of his farm, and that the land had been entered by him. I saw the land. It was not fenced nor enclosed in his farm. O'Geary and I talked on our way back. I heard his testimony on this trial, and what he says I said about entering improved land, it was all a fabrication. We had very little talk
163 about my entering lands. The whole of the talk was about lands we were passing through. There was nothing whatever said about entering unimproved lands, nor that I wouldn't pay taxes on such lands for them. There was nothing said about my going back to Boonville to hunt up other mistakes and see if they were worth entering, because I had made all my entries at that time and made no entries after that. When I found out that the lands I had entered, or a part of them, were claimed by other parties my experience scared me and I quit; don't remember there was anything said about entering lands in which mistakes were made, because I know that I did not know of any mistakes when I made my entr*y*s, and locations. We had no conversation after we got back to Windsor about land matters, nor was there anything about my renting a room of him. I heard O'Geary testify on the trial of the Neill case at Warrensburg. I don't recollect just what he swore to, but I know that it was not near as strong nor as much as he told on the trial of this cause. I recollect an interview I had with Swisher. I did not go to his house until the fall of 1872. I never said a word to him about entering improved lands, nor that I would not enter raw lands and pay the taxes on it for it.

His statement in this particular is wholly erroneous. I
164 told him I had come to view that land. He said that Lampton had told him that there was a damned Yankee about

trying to steal people's land, but for him not to be scared. I told him I had entered the land blind, and had since found out that he was claiming it. He said that Lampton had entered it, but I told him that Lampton had entered a piece a mile east of there. He said he would as leave have that piece as the one he claimed. I never told Swisher that the Kemp land had a two-story brick house on it, because I hadn't seen the Kemp land before I saw Swisher, and there was a one-story frame house on the Kemp land. The next Monday after this conversation I went from Sedalia to Kemp; this was in 1872; I correct myself in this; it was in 1871. When I went to Neill's the first time I had come around by Dunksburg in 1871, and I saw this land in 1871. I saw it again in 1872. I first saw Kemp land in 1871. In 1872 I made a trip to Kemp's, Dunksburg, Neill's, Swisher's, and back to Boonville. In the Clifton Wood case I found a conflict and had my entrys cancelled. I- the Chamberlain case he claimed to own the land, but on the trial of the case John Montgomery, Jr., his attorney, disclaimed ownership and recovered judgment. As soon as I found these conflicts I quit entering. I *made* have made one entry in North Mo. after this. I had
lived in St. Louis 28 years before I went to Boonville. I was
165 engaged in the tobacco and cigar trade. I had traded in
some lands while there. I never entered my lands before I went to Boonville. The lands that I had bought or traded for before for debts were scattered over different parts of the State. I once owned four thousand acres in Southeast Mo., which I got in winding up a partnership, and I immediately transferred it. It may be that this gave me land on the brain. The Jasper county land I had bought from a Washington City man. I had not examined the record in this county before my entries and had no information as to their contents, nor did I ever have any one to examine them for me. I had never seen the map or plat of entries offered in evidence by the defendants before I made my entries. I had no knowledge of the existence of such a record.

Cross-examined by defendants' counsel, said witness testified as follows:

I went to Boonville in the latter part of 1870; went there direct from St. Louis; had lived in St. Louis 28 years previously. I was in the wholesale tobacco and cigar trade ten years. We had customers throughout Illinois and Missouri. I had never been through this part of the State before I went to Boonville. If I had been I went through on the cars to Kansas city. I don't know
whether the railroad was completed then or not. I was not ac-
166 quainted with the inland towns and country. Our principal
trade was confined to the river towns and steamboats. I knew at that time that the country near the rivers was the most settled. I don't know that I knew that the Mo. Pacific railway ran through this county. I wholesaled from 1859 to 1860. I lived in St. Louis ten years after I quit merchandising. During these ten years I was *was* principally engaged in the real-estate business in the city. During this time I knew nothing of the settlement, improvement,

or immigration in this portion of the State, except perhaps in the fall- of 1867–'8–'9 a friend of mine, in Carthage, told me there was considerable immigration to Mo. I was not engaged in any business from 1860 to '67 except settling up my old business and some real-estate business. My partner was engaged a good deal in buying up cheap lands. They were conveyed by deed, all signed and executed, with the grantee's name left blank. These lands had all been previously entered. We kept these lands perhaps six months. I attended to the rents in the city and to sales there and never bought any lands in this part of the country. The highest quantity we ever had at once was about 4,000 acres. I bought the land in Jasper Co. in 1869. I have entered lands in five counties in North Mo.—in Lincoln, Mercer, Nodaway, Atchison, and De Kalb.

I entered land in De Kalb county while in Boonville. There
167 was no adverse claim to it; think I only had one tract in Nodaway; there was no adverse claim; entered three tracts in Mercer Co.; had no trouble with them, but I had to cancel two entries on account of prior entries. I entered one tract in Atchison county. There was no adverse claim to this. After I got a patent I went and examined the lands, and if I found a prior patent or certificate I cancelled mine. South of the river I entered lands in Johnson, Pettis, Henry, Cass, Bates, St. Clair, Polk, and Cedar counties. Of the three tracts in Johnson Co. there were two adverse claims. On one there was no adverse claim. *On one there was no adverse claim.* I entered eight tracts in Pettis Co. Of these five were cancelled on account of others holding prior certificates, duplicates, or patents. I don't remember how many entries I made in some of these counties. I had two or three in Henry; cancelled all but one, and this I sold. In Cass county I had two entries—no adverse claim—and I sold *it*. I had a suit in Johnson, two in Pettis, and *to* in St. Clair Cos., and these were all the suits I had about these lands. As soon as I discovered adverse claims I had my entries cancelled—as soon as I found them holding better titles. I never compromised any of these cases where there was a better title. I never knew anything about the condition of the State, and had no idea

of the extent of immigration to it, outside of the city of St. Louis,
168 until I saw the census of 1870. I spent the winter of 1868–'9 in New York settling up my old partnership business. I did nothing in St. Louis from my return, in 1869, until I moved to Boonville. I made no investments in anything, except in the partnership matter, until I moved to Boonville. I had lit le business with the business men of St. Louis from 1867 to 1870. I knew nothing about the immigration to this portion of the State. I did not read the newspaper accounts of the heavy immigration to this part of the State, nor did I know anything about the progress of the county; don't remember of seeing advertisements of counties having vacant lands. I know I never saw any. I went to Boonville because I wanted to get out of the city. I knew that Boonville was a nice place, and my wife had a cousin there; so we concluded to go there. My wife's cousin's name was Mrs. W. L. Scott. I did not think of going into any business when I went there. I first went around to

the land office because I had nothing else to do, and maybe on account of my previous dealings in lands. Then I had read of the cases where land had been supposed to be entered and it turned out that it was vacant and persons had entered and sold it at a large advance, and I thought I might do likewise. I had read of such instances, and this probably led me to engage in looking up
169 these entries. I presume — had thought of doing this before I went to Boonville. I knew that the land office was at Boonville before I went there. I suppose the knowledge of this fact was like the feather that broke the elephant's back, and may have had something to do with my going to Boonville, & my reading these accounts may have led me to the land office. I went to the land office very shortly after I got to Boonville. The first time I recollect meeting W. H. Widdecombe was on the 5th day of April, 1871. I never formed his acquaintance until then, when he came back from his Pettis Co. trip. I think I wrote to him in March. I could not say whether Widdecombe was over in Pettis Co. a long time or not. I don't remember of ever having seen him previous to his return from Pettis Co., in April. After I got to examining the books I was in the land office most every day. I don't know when W. H. Widdecombe went to Pettis Co. All I know about it was that A. C. Widdecombe told me that his brother was in Pettis Co. He told me this in March, 1871. I don't know how A. C. Widdecombe came to tell me about his brother being in Pettis county. A. C. Widdecombe and I talked about these entries. He told me when I found a vacant tract I should examine and see if the tract had not been entered in connection with some other tract, or included in the entry of adjoining lands. He told me this during the month
170 of March, 1871. I got acquainted with A. C. Widdecombe shortly after I went into the land office the first time. I didn't know that he was hunting up vacant land until I had the conversation with him in March, 1871. Previous to this I had seen him frequently come into the office, look at the book or books, close them up, and go out again, and I had no conversation with him, as to his business, previous to the conversation mentioned. I knew that he was an attorney then in Boonville. I knew afterwards that he had been making entries similar to mine. I did not know of his having made entries of land on which parties were living. I don't remember to have known that he was having any suits over his entries; never heard of his entering the land of Mercer. I don't remember of entering a piece of land near where Widdecombe had entered. I remember the Clif. Wood tract. It may have been the conversation that I had with A. C. Widdecombe that induced me to write to his brother, W. H. Widdecombe. As soon as I had an entry cancelled I dismissed it from my mind. I never heard that he (A. C. Widdecombe) was having any trouble over his entries before he went to Washington city. He went to Washington before his brother came back from Pettis Co. He only told me that some of these lands might be conflicts, meaning that there might be a prior entry on them, and he told me how to examine, as
171 I have before stated, to see if there was any conflict. I think

this conversation induced me to write to W. H. Widdecombe. I found out in March that I had some conflicts and there was a difference between cancelling and entry before and after a patent issued. I wanted to find out about my entries before the patent issued because I had learned that it was easier to cancel before patent issued than after. The mode of examination was to examine the tract book, and if we found 16 forty*s* entered in a section, then we took it for all entered. If we did not find 16 entries or forty*s* and I thought there was a vacant 40 or 80 acres I took a blank plat and marked entries off on the plat. Sometimes curiosity led me to read the name of the person making the entry, but I don't think that I read the Kemps entry until Widdecombe's return, that I have spoken of. In all probability previous to that time I had examined the number of entries in section- 25, 14, and 23, and saw that they were full and paid no attention to the names of the persons making the entries or locations. I don't remember where I learned what the red ink on the tract meant, but I think it was not until I left the office and quit entries. I did not know previous to that time that these red-ink entries meant that land was entered with M. B. land warrants. I afterwards learned that the
172 practice of the land office was not to write out the entry in full on every tract when two or more pieces were entered in different sections, but to enter it only on one piece, and in the other tract to refer to the tract in which the whole entry was posted. These tracts, excepting this reference, would show vacant. Sometimes this reference would be omitted. I examined these tract books covering this whole district. At the time I made my entries I saw the entries all around the piece in controversy. I examined section 24, and I suppose I found there was only 14 entries, and *in* section- 25 and 14 I suppose were full or contained sixteen entries. I suppose I saw that there appeared to be 18 forties entered in sec. 25. Often I found more than 16 forty*s*. If I did I just passed on, but if there was one vacant I then made an examination. On the 5th of April, 1871, after Widdecombe came back from Pettis Co., I went and examined the books in the land office and found that Kemp's entry was made in sec. 25 instead of section 24, & saw then that it was a mistake on the books if Kemp entered in sec. 24, and that the other lands located by him under the same warrant were in sections 23 & 14, and that they were entered by him at one and the same time and all under the same warrant, and then I saw for the first time that there were two entries of the W. ½
173 of the N. W. ¼ of sec. 25, t'p 47, rng. 21. I then saw the entries of Greer and Payne. I don't think that I learned that the entries so made by Kemp was contrary to law until 1872. I did not understand the law nor the business about getting my money back if my entry was not good. I don't think I had any cancelled up to that time. I think I knew when I talked with W. H. Widdecombe that I could get my money back in case of a conflict. I got my patent about a month after this, on April 21, '71. I did not have my entry cancelled, because there was no conflict with it, and for that reason I could not have it cancelled had I wished to

do so. I sent my location to Mr. Herron, my lawyer, at Washington, to be investigated when I found out that Kemp claimed the land, and he (Herron) wrote me that the records at Washington showed just what the records did at Boonville. He pronounced the entry good and got my patent for me. I never came over to look at this land nor made any enquiries as to Kemp's claim until after I got my patent. As soon as Widdecombe told me about Kemp's claim & we looked at the book I sent immediately to Washington. I did not care to know about any claim to the land unless the records in the land office showed it. I was satisfied if the records didn't show any prior entry. Widdecombe told me, April 5, 1871, that Kemp claimed it. He said it was lying outside of Kemp's big farm,
174 in the open prairie. He never wrote me concerning this land. I paid him five dollars for his report on April 5th, 1871, in Boonville. He said that Kemp told him that it had been entered long before by an old entry. I did not write to Kemp until the following summer. I made no examination in Pettis county until I got my patent. I came to view the land, not to see claimants to it. I located this land under a land warrant. I did not know that I could not enter the land under the land warrant. If Kemp was in possession of it I would not have taken the warrant if such had been the case. I did not know about the settlement in Pettis Co., or that it was generally settled. I did not know until after my entries that there were mistakes in the books at the land office. I only knew that the books showed very little vacant land in Pettis Co. I knew that the books showed that it was prairie land. The books showed that the earliest entries in the county were many years ago and in the northeastern portion. I made no proof at the time of my location of the land warrant of the land in controversy as to its occupation, possession, or cultivation.

It is admitted on the part of the plaintiff that the exemplification of his warrant and application offered in evidence by the defendants contained all the proofs made by him when he located said
175 warrant; also that he never paid any taxes on the land, and that he had never been in possession of it.

Said witness, in continuation of his testimony on cross-examination, said:

I wrote W. H. Widdecombe simply to view the land and see whether it was good or not—that is, good land. I never heard of any one while I was at Boonville having entered lands in Pettis Co. I did not write to Widdecombe to examine the records in this county. He said he saw W. T. Kemp. He called him old Kemp; said he told him that his name was W. T. Kemp. I now suppose that it was James Kemp whom he saw.

The next thing I knew was when I came here, in September, 1871, and examined the records Widdecombe said that old man Kemp showed him how the land was entered. He did not tell me that James Kemp was administrator. I first wrote to W. T. Kemp in the summer of 1871. I wrote to him at Sedalia. I suppose Sedalia

was his post office. I don't remember that I wrote to him at Longwood. If I did I don't know how I found out his address. I may have got it from a map. It must have been two or three months after I saw W. H. Widdecombe before I wrote to Kemp. I was in Boonville when I wrote to him. It was between April 5th and September, 1871, that I wrote to Kemp. The first I heard of Jimmy Kemp was when his deposition was taken in
176 this case at his house. The first time that I learned that any one was in possession of this land *until* I went out to Kemp's, in September, 1871. I am positive that I knew nothing about any one being in possession until I went out there. Widdecombe had told me, as I have stated before, that Kemp claimed it, and that it laid outside of his big farm and in the open prairie. I remained at Mr. Kemp's an hour or two. I did not, while at Mr. Kemp's, at the dinner table, and in the presence of his wife, say that I was sorry it had happened, and that I had sent a man out to look at the land before I had entered it, and that he reported before I had entered it that it was raw land. I may have said the former, because I feel that way, but not as to the latter. I had got my information from Widdecombe after I made my entry.

Said witness on re-examination testified as follows:

I wrote to W. H. Widdecombe about the middle of March, 1871. I did not know when I made my entries that a military bounty land warrant had to be located in a body. What I mean by a conflict is when a man had a prior patent, certificate of location, or a duplicate receipt; I do not mean when there was simply an adverse claim. I could not get my money back in this case, because they say
177 at the General Land Office that the land was vacant when I located, and that there is no conflict, and consequently they would not cancel my location.

On recross-examination said witness testified as follows:

Of the eight entries in Pettis Co. I found five conflicts with prior patents, certificate-, or duplicates. In the other three cases I had lawsuits—that is, in the Swisher, Kemp, and Chamberlain cases.

Plaintiff closed.

Mrs. Kemp Recalled.

Mrs. Martha Kemp, one of the defendants, being recalled, testified as follows for def'ts:

I remember when Mr. Sensenderfer visited our house in 1871. He staid for dinner. My husband was there. A Mr. Robert Phillips, who is now dead, and my children were there. He said that he had come out to look at his place; said that he was sorry that he had anything to do with it, and that if he had known how it was he would not have entered it. He said he had paid a man five dollars to come out to look at the land before he entered it, and that this man told him that it was not improved before he entered it. He also said he had no wife nor children.

178 Said witness on cross-examination testified as follows:

I have remembered that conversation ever since. I don't know to whom I first told it. I don't remember of saying anything about it until Sensenderfer brought suit. I spoke to Robert Phillips about it after the suit was brought. After Sensenderfer went away we talked it over among the family. He said he sent the man before he entered the land. He said that the man told him that the land laid outside of old man Kemp's big farm. This conversation was in September, 1871. I had heard of the plaintiff before this, in the month of June, 1871. Uncle Jimmy Kemp, whose deposition has been read in this case, told us that there had been a man there by the name of Widdecombe, and that Widdecombe had told him that the land had been entered. Uncle Jimmy Kemp said that Widdecombe had been to his house in the spring of 1871. I related this conversation to Mr. Jackson, my attorney, just to-day. I told Col. Philips about it last May one year ago. I have managed this case since my husband's death.

This was all the evidence offered in this cause.

179 Whereupon the plaintiff prayed the court to give the following declarations of law as applicable to this case, which were given as follows:

No. 1. The effect of the patent to pl'ff is to convey the legal title to him.

2. Any errors or irregularities in the matters leading up to the issues of pl'ff's patent cannot effect the title conveyed by the patent.

3. Unless Wm. R. Kemp did in fact enter the land is dispute in 1848 the defense fails; and in considering this question the application is to be considered as the foundation, and unless he applied to enter and did enter the land in dispute the court cannot find that issue for def'ts.

In determining what land said Kemp did enter the certificate given him does not control. It is only evidence to be considered with other evidence of the fact, and unless, considering all the evidence tending to show what land said Kemp did enter def'ts have established the fact that said Kemp did so enter the land in dispute the def'ts have failed to make out the defence relied on in the answer.

8. Unless the evidence shows that if pl'ff had not entered the land in dispute the def'ts would on the facts proved be en-
180 titled to receive a patent from the United States for the land in dispute, and that when pl'ff entered said land he hand notice of such fact, the defense fails.

9. If pl'ff is entitled to recover and it appears from the evidence that def't, Martha J. Kemp, has since the death of her husband controlled and rented out the land in dispute and received the rents thereof, then pl'ff is entitled to judgment against her for possession and damages for rents and profits in such sum as from the evidence said premises were worth for that time.

10. Even if there is a misjoinder of parties def't none can take advantage of that fact but those who are so misjoined, and if they

do not take advantage of that fact it makes no difference in this case, and if pl'ff is entitled to recover he may recover against all the def'ts in possession either actually of the land or by tenants when this suit was begun for possession and rents & profits from the time *as* they went into possession and down to this time.

15. The statute of limitation pleaded by def't- is not a bar to this action.

18. The deed from A. S. Walker, trustee or mortgagee, to Wm. Kemp is not in itself sufficient to convey the title of Wm. R.
181 Kemp in the land in dispute without further proof of the facts which would authorize a sale under the mortgage. The plaintiff also prayed the court to declare the law as follows:

4. Even if the land did require that bounty land warrants be located in a body, yet that is directory, and if located otherwise and a patent issues it would not vitiate the title*d*. Refused.

5. The Congress of — United States has the exclusive right to provide for the disposal of the public lands of U. S. and to whom it shall be disposed & how, and has done so, and the courts have no power to interfere with the title conveyed by patent of United States or to take the title from the one to whom the patent is issued & give it to another except where said patent has been procured by actual fraud when it should have been issued to such other, or whereby mistake and misconstruction of the law of Congress on that subject by the officers of the Land Department the patent has issued to the one whereby proper construction of said law it should have been issued to the other.

To which last declaration, No. 5, is the marginal note of the court as follows:

Not given as a whole, but refused only because it limits the power of the courts to the corrections of fraud and mistakes of law.
182 6. If there was a mistake and Kemp did not enter the land he intended to there was ample means under the acts of Congress to correct such error; and as def'ts' grantors did not correct the same in that way def'ts cannot have the same done by this court basing its action on such neglect. Refused.

7. If the court determines as a matter of law that there is a power in the court now to correct a mistake, if any was made, by Wm. R. Kemp in entering W. ½ N. W. sec. 25 when he intended to enter W. ½ N. W. sec. 24, then the act of Congress for disposal of the public lands and the rules and regulations of the Land Department of the United States and the construction of said laws by the said Land Department and the United States courts are rules of decision in this court, and unless the facts shown would be sufficient to authorize the Land Department to cancel the entry of pl'ff if no patent had issued and issue a patent to def'ts, then the court cannot divest pl'ff of title and vest it in def'ts. Refused.

11. Pl'ff when he entered the land in dispute was not bound to take notice of any of the deeds read in evidence and is not affected with notice by them or their being of record. Refused.

12. The court declares the law to be—
183 That although W. R. Kemp may, on the — day of June,

1848, have received a certificate from the register and receiver of the local land office of the United States at Clinton, Missouri, for land in controversy, yet if the court shall further find that said W. R. Kemp had not made a written application to the proper office of the United States to locate a military bounty land warrant [intended to be on said land] on said land, then the said W. R. Kemp never did enter or locate the land in controversy.

Which said declaration No. 12 has the marginal note of the court in words as follows:

Given with the words in brackets added by the court.

13. Even if W. R. Kemp did by mistake enter other land when he intended to enter that in dispute he or his legal representatives could only correct that mistake before the entry by pl'ff, and whether pl'ff had notice of such intended entry or occupation makes no difference. Refused.

14. If pl'ff brought suit in this court April 14th, 1873, against Wm. R. Kemp for possession of the land in dispute and the same was remanded to the United States circuit court and pl'ff suffered a nonsuit therein Nov., 1877, and if pl'ff also brought suit
184 in this court Aug. 13th, 1877, against the widow and heirs of said W. T. Kemp, he having died, and suffered a nonsuit therein in May, 1880, and brought this action Aug. 13th, 1879, then the statute of limitation pleaded in this answer is not a bar to this action. Refused.

16. If it appears one of the heirs of Wm. T. Kemp is not a party to this action def'ts cannot have a decree in their favor if otherwise entitled thereto. Refused.

17. The mortgage or deed of trust of Wm. R. Kemp offered in evidence is not sufficient to convey any title or claim except that which W. R. Kemp had at the time. It would not convey any after-acquired title [of such Kemp]. Words in brackets added by the court.

Which declarations the court refused; to which refusal of the declarations thus prayed the plaintiff, by his counsel, then and there excepted at the time.

The court, of its own motion, gave the following declarations of law:

12. The court declares the law to be—

That although W. R. Kemp may on the — day of June, 1848, have received a certificate from the register and receiver of
185 the local land office of the United States at Clinton, Missouri, for land in controversy, yet if the court shall further find that said W. R. Kemp had not made a written application to the proper office of the United States to locate a military bounty land warrant [intended to be on said land] on said land, then the said W. R. Kemp never did enter or locate the land in controversy.

17. The mortgage or deed of trust of W. R. Kemp offered in evidence is not sufficient to convey any title or claim except that which W. R. Kemp had at the time. It would not convey any after-acquired title of such Kemp.

Under said declarations, the evidence, and the pleadings the

court, on the 21st day of January, A. D. 1881, found the issues for the defendants and rendered a decree as prayed in the answer of the defendants, Samuel A., Ida Belle, James W., and Martha J. Kemp; and on the 24th day of January, A. D. 1881, and within four days after the finding and verdict of said court the plaintiff filed his motion for a new trial as follows:

Mo. for New Trial.

In Circuit Court, Pettis Co., Mo. Jan. Term, 1881.

WILLIAM SENSENDERFER, Pl'ff,
against
SAMUEL A. KEMP, MARTHA J. KEMP, *et al.*, Def'ts.

186 Now, at this time, comes the plaintiff herein and moves the court to set aside the finding and judgment of the court herein and grant a new trial in this cause for the reasons:

Because the court admitted improper evidence and testimony on the part of defendants against the objections of the plaintiffs.

Because the court excluded proper evidence and testimony offered by plaintiff.

Because the court refused proper declarations of law asked by the plaintiff and gave improper ones of its own motion.

Because the finding of the court is against the declarations of law as given by the court and is against the evidence and entirely unsupported by the evidence.

Because the finding and judgment of the court is illegal, inequitable, and unjust and is for defendants when it should be for pl't'ff.

Because the finding and judgment is erroneous and irregular, in this: It is for defendants, as widow and heirs of Wm. T. Kemp, when the whole of said heirs are not parties to this action.

187 Because since the trial pl'ff has discovered new and important & material evidence which he can produce on a new trial, as is shown by the affidavits submitted herewith, and which by due and proper dilligence he could not procure to use on this trial.

SMITH & SHIRK,
Att'ys for Pl'ff.

And in support thereof filed affidavits of Henry Rector, Wm. Sensenderfer & E. J. Smith as follows:

STATE OF MISSOURI, } *ss:*
County of Pettis, }

Henry Rector, being duly sworn, on his oath says that in the year A. D. 1849 he assisted Mentor Thompson, then county surveyor, in the survey of some land in the vicinity of the W. ½ N. W. ¼ sec. 24, township No. 47, of range twenty-one, in Pettis county, Missouri.

That, according to his recollection, Mentor Thompson began his

survey at the southwest corner of sec. 24, in said township, and ran north to the southwest corner of the W. ½ of the N. W. ¼ of said section, surveying the N. W. ¼ of the S. W. ¼ of said sec., t'w'p 47, R. 21; that he does not remember all the lines now, but is positive that no survey was made of the W. ½ of the N. W. ¼ of sec. 24, in said township 47, R. 21, which tract of land was then claimed by Riley Kemp; that he was with the surveying party during the day and assisted in said survey by carrying the flag; that he
188 did not carry the chain; that he never at any time assisted in the survey of the W. ½ of the N. W. ¼ of said sec. 24 of said t'w'p & range; that Riley Kemp at that time lived about one-quarter of a mile south of the south line of the W. ½ N. W. ¼ sec. 24, t'w'p 47, R. 21; that during the said survey, in A. D. 1849, no duplicates were produced by Kemp or any other person describing any land whatever; that he is positive of this, because he had entertained doubts as to whether or not Kemp had entered said land (the W. ½ N. W. ¼ sec. 2, T. 47, R. 21), and if any duplicates or title papers had been produced describing this land it would have settled the above question in his mind.

That he does not believe that Kemp entered the land; that it was the general opinion through the neighborhood that Kemp had not entered said land; that he does not remember of being present at any time when Riley Kemp's land was surveyed, or being present or assisting in the survey of any other land in that vicinity except his own, as stated above; that he was subpœnaed in the trial of the cause wherein Wm. Sensenderfer was plaintiff and Samuel A. Kemp *et al.* were defendants, on or about the 7th of January, A. D. 1881, but on account of his illness, inclement weather, & old age, being seventy-two years old, he was unable to obey said summons.

HENRY RECTOR.

189 Subscribed and sworn to before me this 28th day of January, A. D. 1881.

My commission expires May 10th, 1884.

[L. S.] Witness my hand & seal.

V. E. SHAW,
Notary Public.

STATE OF MISSOURI, } ss:
Pettis County, }

In Circuit Court. Jan. Term, 1881.

WM. SENSENDERFER, Pl'ff, }
against
SAMUEL A. KEMP, Def't. }

The plaintiff, Wm. Sensenderfer, being duly sworn, says: I did not take any steps to procure the attendance of Henry Rector as a witness to testify on the trial of this cause till the trial, because I was present at the taking of the deposition of Mentor Thompson, which is filed in this cause, at the office of Philips & Vest, in Sedalia, Mo.,

June 5th, 1877, and heard said Thomson then testify, & in that testimony said Thompson stated that said Rector, to whom he referred in like manner as in his testimony on the trial in this cause, was then dead, though by reading said deposition now on file in this case I see the fact of the death of said Rector is not written down as a part of said deposition, and I am not acquainted with said Rector, & except as mentioned by said Thomson I never heard of him, and until said Thomson testified herein I supposed said Rector was dead,
190 and I was greatly surprised when I heard said witness testify that said Rector is still living.

That soon after, and in due time to have gotten said witness to testify on this trial if he had been able to attend there at all, I was about to take a subpœna for said witness to bring him to court to testify in this case, when I learned from the clerk and sheriff of this county that since the trial began the defendants had taken out a subpœna for said Rector and had it served on him to come and testify in this case, and that said witness was then so feeble and sick that it was impossible for him to come to court; wherefore, believing said facts, and as it would be useless to attempt to get said witness to court at the said trial, I did not take out such subpœna.

That since said trial I have used every effort to see and get an affidavit of said Rector to ascertain what his testimony would be, and to that end sent twice to Georgetown, where said witness resides, and went once myself and took a notary with me, and only to-day learned what said witness would testify to, and got his affidavit filed herewith.

That if a new trial is granted I can get said witness or his deposition for use at next term of this court; that the affiant does not apply for a new trial for vexation or delay, but because he believes he has a meritorious cause of action herein, and has been improperly deprived of his rights by the finding & judgment
191 of the court herein. Affiant further says, now that he has seen said Rector, which he did this day for the first time, said Rector is very old and feeble and in bad health, and is somewhat deaf, and has only one leg, and affiant verily believes said Rector was, when this case was on trial, so feeble and sick that he could not attend the court.

WM. SENSENDERFER.

Signed and sworn to before me this 28th day of Jan., 1881.
[SEAL.] B. H. INGRAM, *Clerk*,
By L. JACKSON, *D. C.*

And E. J. Smith, one of att'ys for pl'ff, being duly sworn, says: I know the facts set forth in the foregoing affidavits as to the efforts made to get said Rector to this court as a witness and to find out what he knew, and that the same is true as above set out in the affidavit of Wm. Sensenderfer. I also know that until the testimony of said Thomson upon said trial the attorneys for plaintiff understood and supposed said Rector was dead, and were greatly surprised when *he* learned otherwise.

E. J. SMITH.

Signed and sworn to before me this 28th Jan., 1881.

B. H. INGRAM, *Clerk*,
[SEAL.] By L. JACKSON, *D. C.*

192 *Motion for New Trial Overruled.*

Which said motion the court, on the — day of January, A. D. 1881, overruled.

To which ruling and order of the court the plaintiff then and there excepted at the time.

And on the — day of January, A. D. 1881, the plaintiff filed his motion in arrest of judgment as follows:

Mo. in Arrest.

In Circuit Court of Pettis Co., Mo. Jan. Term, 1881.

WM. SENSENDERFER, Pl'ff,
against
SAMUEL A. KEMP, MARTHA J. KEMP, *et al.*, Def'ts.

Now, at this time, comes the plaintiff in this action and moves the court to arrest the judgment of the court in this case for the reasons:

Because the answer of the d'f'ts does not state facts sufficient to warrant the court in giving judgment for d'f'ts, the widow and heirs of W. T. Kemp, and because said answer does not state facts sufficient to support any judgment in favor of def'ts.

Because the judgment of this court is erroneous, in this: It is in favor of the widow and heirs of Wm. T. Kemp when all of said heirs are not parties to this action, and this fact appeared for the first time on the trial of the case in the testimony of Martha J. Kemp.

193 Because there was & is no offer in the answer to refund to pl'ff the money he paid to enter the land in question, and it is not requested in the judgment of the court.

Because this court has no jurisdiction to hear or determine the matters set up in the answer or to give the relief sought in the answer as given in the judgment or any relief to defendants herein.

SMITH & SHIRK,
Att'ys for Pl'ff.

Which said motion the court, on the — day of January, 1881, overruled.

To which ruling and order of the court plaintiff then and there excepted at the time.

He therefore prays the court to allow and sign this bill of exceptions, and that the same may be signed and sealed and made a part of this record, which is done, this the — day of January, A. D. 1881.

J. P. STROTHER, [SEAL.]
Judge of the 6th Judicial Circuit of the State of Missouri.

WILLIAM SENSENDERFER
vs.
SAMUEL A. KEMP, MARTHA J. KEMP, JAMES W. KEMP, IDA BELL Kemp, R. H. Payne, Thomas Wasson, Jr., John W. Payne, Jr., and J. T. Hedges.

194 Now, at this day, come the parties hereto, by their respective attorneys, and the plaintiff now files his affidavits in support of the motion for a new trial, and said motion being now taken up and submitted to the court for final hearing, and the court having seen and heard the same and being fully advised in the premises, overrules said motion for a new trial; to which action of the court in overruling said motion plaintiff then and there at the time duly excepted; and the motion in arrest of judgment heretofore filed herein by plaintiff being now taken up and submitted to the court, and the court having seen and heard the same and being fully advised in the premises, overrules said motion; to which action of the court in overruling said motion the plaintiff then and there at the time duly excepted.

And now plaintiff presents his bill of exceptions herein, which are by the court filed and signed, and plaintiff files his affidavit for appeal and his appeal bond, which said bond is by the court approved, and an appeal is by the court granted herein to the supreme court of the State of Missouri, and a supersedeas is by the court allowed.

Which affidavit is in words and figures as follows, to wit:

195 *Affidavit for Appeal.*

In the Circuit Court within and for Pettis county, State of Missouri.
January Term, A. D. 1881.

WILLIAM SENSENDERFER, Plaintiff,
against
SAMUEL A. KEMP, IDA BELL KEMP, MARTHA J. KEMP, and JAMES W. Kemp, Thomas Wasson, Jr., John W. Payne, Jr., R. H. Payne, and J. T. Hedges, Defendants.

William Sensenderfer, the above-named plaintiff, being duly sworn, upon his oath says that his appeal in the above-entitled cause is not taken for vexation or delay, but because he believes himself aggrieved by the judgment of said court in said cause.

WM. SENSENDERFER.

Subscribed and sworn to before me this 28th day of January, A. D. 1881, at my office, in the city of Warrensburg, county of Johnson and State of Missouri.

WM. E. CRISSEY,
[SEAL.] *Notary Public within and for Johnson County and State of Missouri.*

Commission expires July 23, 1882.

Which said bond is in the words and figures as follows, to wit:

In the Circuit Court within and for Pettis County and State of Missouri. January Term, A. D. 1881.

196 WILLIAM SENSENDERFER, Plaintiff,
against
SAMUEL A. KEMP *et al.*, Defendants.

Appeal Bond.

Know all men by these presents that we, William Sensenderfer, as principal, and William E. Crissey and Edward L. Degarmo, as securities, are held and firmly bound unto Samuel A. Kemp, Ida Bell Kemp, Martha J. Kemp, James W. Kemp, R. H. Payne, John W. Payne, Jr., Thomas Wasson, Jr., and J. T. Hedges, the defendants in the above-entitled cause, in the sum of three hundred dollars ($300.00), upon the following conditions: Whereas the said William Sensenderfer has appealed from the judgment of the said Pettis county circuit court rendered at the January term, 1881, of said court against him in the above-entitled cause: Now, if the said William Sensenderfer shall prosecute his appeal with due diligence to a decision in the supreme court of the State of Missouri and shall perform such judgment as said court shall give, and if the judgment of said circuit court or any part thereof be affirmed and he shall comply with and perform the same so far — it may be affirmed, and shall pay all damages and costs which may be awarded against him, the said appellant, then this recognizance shall be void; otherwise the same shall remain in full force and effect.

In testimony whereof we have hereunto set our hands and
197 affixed our seals this 27th day of January, A. D. 1881.

WM. SENSENDERFER. [SEAL.]
EDWARD L. DE GARMO. [SEAL.]
WM. E. CRISSEY. [SEAL.]

STATE OF MISSOURI, } ss:
County of Johnson, }

W. E. Crissey, of lawful age, being duly sworn, upon his oath says that he is worth in real and personal property, over and above all exemptions allowed by law of this State and his indebtedness, at least the sum of five hundred dollars.

WM. E. CRISSEY.

Subscribed and sworn to before me this 27th day — January, A. D. 1881.

WM. H. BRINKER,
[SEAL.] *Notary Public, Johnson County, Mo.*

My com. will expire July 15, 1881.

STATE OF MISSOURI, } ss:
Johnson County, }

Edward L. De Garmo, of lawful age, being duly sworn, upon his oath says that he is worth in real and personal property, over and above all his exemptions and indebtedness, at — the sum of five hundred dollars.

EDWARD L. DE GARMO.

Subscribed and sworn to before me this 27th day of January, 1881.

198 WM. H. BRINKER.
[SEAL.] *Notary Public, Johnson County, Mo.*

My commission will expire July 15, 1881.

STATE OF MISSOURI, }
Pettis County. }

I, Benton H. Ingram, clerk of the circuit court in and for said county, hereby certify that the above and foregoing is a complete copy of the record of the case of Wm. Sensenderfer against Samuel A. Kemp, Martha J. Kemp, Ida Belle Kemp, and others, as the same is now in my office, as clerk of said court.

In witness whereof I hereto set my hand and the seal of said court this 1st day of April, 1881.

[SEAL.] B. H. INGRAM, *Clerk,*
By C. L. JACKSON, *D. C.*

In the Supreme Court of Missouri. October Term, 1881.

And afterwards, to wit, at the October term, A. D. 1881, and on the 14th day of March, 1882, an assignment of errors was filed in the supreme court of the State of Missouri in said cause, which is in the words and figures as follows:

199 In Supreme Court of the State of Missouri. — Term, 188–.

WILLIAM SENSENDERFER, Appellant, }
vs.
SAMUEL A. KEMP and Others, Respondents. }

And now comes the said appellant and says that in the record and proceedings of the court below, in the above-entitled cause, there is manifest error, and for error said appellant assigns the following, to wit:

1. That said court admitted improper and illegal testimony offered by respondents.
2. That said court rejected proper and legal testimony offered by appellant.
3. That the court gave *the* improper and illegal declarations of law.

4. That the court refused to give proper and legal declarations offered by appellant.
5. That the verdict was againt the evidence.
6. That the verdict was against law.
7. That the verdict was against both law and evidence and against the law under the evidence.
8. That the verdict was against the weight of evidence.
9. That the judgment was rendered in favor of the respondents when it should have been rendered for the appellant.
10. That said court overruled the motion for a new trial made by appellant.

Wherefore appellant prays that said judgment be reversed and held for naught and that pl'ff have judgment here such as he should have had in the court below, or that this cause be remanded with instructions to the court below to proceed therein according to law.

SMITH & SHIRK,
Att'ys for Appellant.

And now come the respondents and for joinder in error say there is no error in the record and proceedings of said Pettis cir. c't in said cause as assigned by said appellant.

PHILIPS & JACKSON,
For Respondents.

On the back of said paper appear the following endorsements, to wit:

200 No. 1157. Wm. Sensenderfer, app'l't, *vs.* Samuel A. Kemp, &c., resp'ts. Assignment of error. Filed March 14, 1882. Henry W. Ewing, cl'k, by W. K. Bradbury, D. C.

201 And afterwards, to wit, on the 29th day of October, A. D. 1883, the following further proceedings were had in said cause, to wit:

* * * * * * *

Submission of Cause.

WM. SENSENDERFER, App.,
vs.
SAMUEL A. KEMP *et al.*, Resp.

* * * * * * *

Come now the parties in the above-entitled causes, by attorneys, and, after argument therein, submit these causes to the court.

And afterwards, to wit, on the 2d day of February, A. D. 1885, the following further proceedings were had in said cause, to wit:

Judgm't.

WILLIAM SENSENDERFER, Appellant,
vs.
SAMUEL A. KEMP, MARTHA J. KEMP, JAMES W. Kemp, Ida Belle Kemp, R. H. Payne, Thomas Wasson Jr., John W. Payne, and J. T. Hedges, Respondents.
} Appeal from Pettis County Circuit Court.

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court, here being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid in form aforesaid by the said Pettis county circuit court rendered be in all things affirmed and stand in full force and effect; and it is further considered and adjudged by the court that the said respondents recover against the said appellant their costs and charges herein expended, and have therefor execution. (Opinion filed.)

202 Which said opinion is in the words and figures as follows, to wit:

WILLIAM SENSENDERFER, Appellant,
vs.
SAMUEL A. KEMP *et al.*, Respondents.

Opinion of the Court.

This was an action of ejectment for the west half of the northwest quarter of section 24, T. 47, R. 21, in Pettis county. The defendants are the widow and heirs of William T. Kemp and their tenants. The Kemps set up an equitable defense and prayed for affirmative relief, which was granted, divesting plaintiff of his title and investing the same in these defendants, from which decree plaintiff appealed. William R. Kemp, claiming to own this property and being in possession, made a deed of trust on the same, under which it was sold in 1853 to William Kemp and by him conveyed to Cummings in 1868, and by the latter conveyed to William T. Kemp in January, 1869. These parties all had possession during their alleged ownership.

The material issues tendered by the answer are that William R. Kemp entered at the local land office at Clinton these 80 acres in section 24 and two 40-acre tracts, one in section 14 and the other in section 23, all in the same township and range; that he received a certificate of such location, which is lost; that the *that the*
203 officers at Washington issued a patent to him which, by mistake, described the 80-acre subdivision as in section 25 instead of section 24, and that plaintiff, with full notice of all this and in fraud of the defendants, procured a patent for the lands sued for. The plaintiff's title is a patent from the United States to him, dated April 20, 1871, upon an entry made with a land warrant at the

local office at Boonville on Dec. 28, 1870. The original application made by William R. Kemp at the local office at Clinton and from that office transmitted to the office at Washington bears date 13 June, 1848, and describes the land as being in sections 14, 23, and 25, the 80 acres in the latter. It is in the handwriting of the register of the local office, Watson, and was doubtless signed by Kemp, and with it was transmitted a military bounty land warrant calling for 160 acres, issued under the act of Feb. 11, 1847. The records at the local office at Boonville did not show that the 80 acres in section 24, the land here in dispute, had been disposed of otherwise than might be gathered from certain entries on the tract book, hereafter referred to. To prove the location by Kemp to have been made on the 80 acres in sec. 24 and not in sec. 25 the defendants show that one Greer entered the north half of the 80 in sec. 25 on the 16 January, 1854, and a patent issued to him therefor dated
15 July, 1854, and that the south half was entered by one
204 Payne Nov. 29, 1853, and a patent issued to him dated May
1, 1854. Both of these entries were made at the Clinton office. The business of that office appears to have been transferred to the Warsaw office.

It also appears that the register of the latter office, M. L. Means, on July 1, 1858, made out and certified a map of all the lands in Pettis county, with the names of the original purchasers endorsed on each sectional subdivision, from which the land in question appears as having been sold to William R. Kemp. It does not appear that the patent issued to Kemp was ever delivered to him, and the mistake was first discovered by the Kemps in 1871, when William T. Kemp called for an exemplification and after plaintiff produced his patent. The land as described in sections 14, 23, and 24 would all lie in one body, but would not lie in a body if the 80 acres were located in sec. 25.

The books and records of the local office at Warsaw were all destroyed by fire in 1861, and the business of that office was transferred to the Boonville office in 1863. The tract book at the latter office was compiled and made up at Washington, after the books at the local office had been destroyed, from reports from the Warsaw office. It is therefore clear that the 80 acres tract, sec. 25, was not
regarded as having been sold to Kemp by the office at Clinton,
205 for Greer and Payne were allowed to and did enter it after
Kemp had made his location. The same may be said of the office at Washington when the patents were issued to them. At a still later date, in 1858, it would seem, from the plat furnished Pettis county, the land in sec. 24 appeared upon the tract book at Warsaw as sold to Kemp.

Besides this Kemp's warrant was issued under the act of Feb'y 11, 1847, which required the land upon which the same should be located to be "in a body." This provision of the law must have been disregarded by the officers if Kemp located his warrant upon the 80 acres in sec. 25, which is not to be assumed. In addition to all this Mr. Thompson, a surveyor, testifies that he surveyed the land for William R. Kemp in the spring of 1849, when some ques-

tion arose as to what land he had entered; that Kemp then produced his certificate which showed that he had located his warrant upon the lands in sections 14, 23, and 24, and which the witness then surveyed for him from the description contained therein. William R. Kemp knew of the entry by Payne and Greer and induced them, at least one of them, to locate the 80 in sec. 25. William R. Kemp had possession of the 160 acres as a whole up to the time he left for Oregon, which was in 1851 or 1852. He died on the road. The conclusion is irresistable that Kemp intended to and did locate the land in question; that the books so showed and it was so understood
206 at the local offices, and that his duplicate so stated, though there was a misdescription in the application. He acquired the equitable title to this land. The authorities cited by the plaintiff to show that the courts cannot go behind this patent and adjust the rights of the parties have no application to this case. When the legal title has passed from the United States to one party and it ought to go to another it is competent for the courts to declare the holder of such legal title a trustee and to compel a conveyance to the party who has the paramount equity. Garland *vs.* Wynn, 20 How., 6; Lindsay *v.* Howes, 2 Black., 554; Johnson *vs.* Townley, 13 Wal., 72; Widdecombe *vs.* Childers (opinion of this court filed Feb'y 4, 1884). The prior right to this land is, as we have seen, shown to be in these defendants, and their right to the land in equity and conscience cannot be denied. If the plaintiff entered this land and acquired the legal title with knowledge of this equitable title, then, as between him and the defendants, their equity is the superior and he must be held to hold the legal title in trust for the defendants, and under the statute of this State may be divested of that legal title without a conveyance. William T. Kemp went upon this land under his purchase in 1869, built a house on it in that year of considerable value, and lived on it until October, 1873, when the
207 house was destroyed by fire. He died in 1874. There is much evidence in the case which tends to show that plaintiff and one Widdecombe, from whom plaintiff got the warrant with which the entry was made *and* on the same day, were operating in concert, and that through an agent they had made inquiry and been informed that this land had been entered by Wm. R. Kemp and was then owned by Wm. T. Kemp, who resided on it, and that this information was received before the entry was made by the plaintiff. The circuit court found that the plaintiff had such knowledge and information and we are satisfied the finding was correct.

But, aside from this, the testimony shows that in the fall of 1870 the plaintiff went to Boonville and there engaged in hunting up "mistakes" at the land office with a view of making a profit therefrom. Witnesses report him to have said he did not want vacant or unimproved land, but that he wanted improved lands owned by "rich men." He knew that there were many mistakes in these books at Boonville. He saw that the 80 acres in sec. 25 appeared to have been entered both by Kemp and Greer and Payne. The land was close to Boonville, and Pettis county was well settled. There was surely enough to put a prudent person upon inquiry. Notice

"is actual when the purchaser either knows of the existence of the adverse claim of title or is conscious of having the means of
208 knowledge, although he may not use them." Speek *vs.* Riggin, 40 Mo., 405. He is not to be charged with constructive notice of the deeds of record through which the defendants claim, for he does not claim by or through any of them. Under the circumstances of this case, however, and in the very nature of things open to his view and actually known by him, he was called upon to make further inquiry as to whether this land was open to a fair sale or entry. This inquiry would have lead him to a full knowledge of the true state of the title, and he must be charged with such knowledge. 2 Ch. *v.* Hatcher, 58 Mo., 235; 2 Pomeroy, Eq*r.* Jur., sec. 597.

2. It appears that a minor heir of William T. Kemp was not made a defendant, affirmative relief was prayed for in the answer, and there was no suggestion made by any pleading that there was a want of proper parties. The cause was tried upon its merits without regard to such defect, though discovered on trial. The decree is such as not to prejudice the rights of the infant, and the cause will not be reversed because of this defect in parties. The showing made for new trial on the ground of newly discovered evidence is without merit. Judgment of the circuit court affirmed. All concur.

F. M. BLACK, *J.*

209 And afterwards, to wit, on the 21st day of June, A. D. 1886, the following further proceedings were had in said cause, to wit:

WM. SENSENDERFER, App., *vs.* SAMUEL A. KEMP *et al.*, Resp. } Appeal from Johnson County Circuit Court.

Now, at this day, there is presented to the Honorable John W. Henry, chief justice, a writ of error to reverse the judgment in the above cause, a citation directed to the said respondents citing and admonishing them to be and appear at a Supreme Court of the United States on the second Monday of October next; also a supersedeas bond in the sum of $500.00, which said writ of error is allowed, said citation signed, and bond approved, and ordered to be filed and made a part of the record herein; and thereupon it is further ordered that a supersedeas be granted staying all further proceedings upon the judgment herein until the determination of this cause in the Supreme Court of the United States.

Which said bond is in the words and figures as follows, to wit:

210 Know all men by these presents that we, William Sensenderfer, as principal, and Edward L. De Garmo and Wm. E. Crissey, as sureties, are held and firmly bound unto Samuel A. Kemp, Martha J. Kemp, James W. Kemp, Ida Belle Kemp, R. H. Payne, Thomas Wasson, Jr., John W. Payne, Jr., J. T. Hedges, in the

full and just sum of five hundred ($500.00) dollars, to be paid to the said Samuel A. Kemp, Martha J. Kemp, James W. Kemp, Ida Belle Kemp, R. H. Payne, Thomas Wasson, Jr., John W. Payne, Jr., and J. T. Hedges, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 19th day of June, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at the October term, A. D. 1884, of the supreme court of Missouri, in a suit depending in said court between William Sensenderfer, appellant, and Samuel A. Kemp, Martha J. Kemp, James W. Kemp, Ida Belle Kemp, R. H. Payne, Thomas Wasson, Jr., John W. Payne, Jr., and J. T. Hedges, respondents, judgment was rendered against the said appellant, and the said appellant having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said respondents, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington, D. C., on the second Monday of October next:

Now, the condition of the above obligation is such that if the said appellant shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM SENSENDERFER. [SEAL.]
EDWARD L. DE GARMO. [SEAL.]
WM. E. CRISSEY. [SEAL.]

Sealed and delivered in presence of—

SAM'L P. SPARKS.

June 21st, 1886.

Approved by—

JNO. W. HENRY, *Judge.*

211 [Endorsed:] No. —. United States circuit court, western district of Missouri. —— —— *vs.* —— ——. Appeal bond. 8—. Dated — day of ——, 187-. Filed — day of ——, 187-. —— ——, clerk.

UNITED STATES OF AMERICA,
State of Missouri, County of Johnson, } *sct:*
Western District of Missouri,

Before me, Sam'l P. Sparks, a notary public within and for Johnson county, State of Missouri, personally appeared Edward L. De Garmo, to me well known, who upon oath states that he is worth over and above his indebtedness the sum of three thousand dollars, and that he owns real property to that amount, subject to execution, in Johnson county, State of Missouri.

EDWARD L. DE GARMO.

Subscribed and sworn to before me this 19 day of June, 1886.
[SEAL.] SAM'L P. SPARKS,
Notary Public, Johnson Co., Mo.

UNITED STATES OF AMERICA,
State of Missouri, County of Johnson, } *sct:*
Western District of Missouri,

Before me, Samuel P. Sparks, a notary public, personally appeared Wm. E. Crissey, to me well known, who upon oath states that he is worth over and above his indebtedness the sum of five thousand dollars, and that he owns real property to that amount, subject to execution, in Johnson county, State of Missouri.

WM. E. CRISSEY.

Subscribed and sworn to before me this 19 day of June, 1886.
[SEAL.] SAM'L P. SPARKS,
Notary Public, Johnson Co., Mo.

UNITED STATES OF AMERICA,
Western District of Missouri, } *sct:*

I do hereby certify that the parties subscribing the within bond are respectively over the age of twenty-one years and are competent to contract, and that their signatures to said bond are genuine; I further certify that said bond is good and sufficient.

Witness my hand & official seal this 19 day of June, 1886.
[SEAL.] SAM'L P. SPARKS,
Notary Public, Johnson Co., Mo.

212 STATE OF MISSOURI, *sct:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same appears of record and on file in my office.

Seal of the Supreme Court of Missouri.

In witness whereof I have hereunto set my hand and affixed the seal of said court. Done at office, in the city of Jefferson, State aforesaid, this 20th day of September, A. D. 1886.

HENRY W. EWING, *Clerk.*

Endorsed on cover: Missouri supreme court. No. 280. William Sensenderfer, plaintiff in error, *vs.* Samuel A. Kemp, Martha J. Kemp, James W. Kemp, Ida Belle Kemp, R. H. Payne, Thomas Wasson, Jr., John W. Payne, Jr., & J. T. Hedges. Filed January 3rd, 1887.

WILLIAM SENSENDERFER, Plaintiff in Error,
vs.
SAMUEL A. KEMP, JAMES W. KEMP, IDA BELLE KEMP, MARTHA J. Kemp, R. H. Payne, Thos. Wasson, Jr., Berry Greer, Jr., Jno. W. Payne, Jr., and J. F. Hedges, Defendants in Error.

In error to the supreme court of the State of Missouri.

Comes now the said plaintiff in error, William Sensenderfer, and says that in the record and proceedings in the above-entitled cause there is manifest error, and for error said plaintiff in error assigns the following, to wit:

First. That the answer of defendant contains no equity, and all that portion of same setting up new matter by way of equitable defense constitutes no defense to plaintiff's action herein and did not entitle the said defendants to the decree entered by the court in their behalf.

Second. That the trial court admitted improper and illegal testimony offered by the defendants in error and against the objections of the plaintiff in error.

Third. That the trial court refused to give legal and proper declarations of law on the legal issues in the case as requested by the plaintiff in error, to wit, numbers 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, as asked by the plaintiff in error and in modifying declarations numbers 12 and 17.

Fourth. That the court gave of its own motion improper and illegal declarations of law.

Fifth. That the evidence in the case does not support the special finding of facts and decree of the court.

Sixth. That the special finding and decree is contrary to the law as declared by the court.

Seventh. That the finding and decree was against the law and the evidence and the weight of the evidence at the trial and was inequitable.

Eighth. That the finding and decree under the pleadings and the evidence should have been for the plaintiff in error instead of for the defendants in error.

Ninth. That the said Pettis county, Missouri, circuit court nor the supreme court of Missouri had the jurisdiction to render the decree it did.

Tenth. That the said circuit court of Pettis county, Missouri, erred in refusing to sustain plaintiff in error's motions for a new trial and in arrest of the finding and decree.

Eleventh. That the supreme court of the State of Missouri erred in not reversing the decree of the circuit court of Pettis county, Missouri, on account of the errors above enumerated.

WILLIAM SENSENDERFER, Plaintiff in Error,
vs.
SAMUEL A. KEMP, JAMES W. KEMP, IDA BELLE KEMP, MARTHA J. Kemp, R. H. Payne, Thos. Wasson, Jr., Berry Greer, Jr., Jno. W. Payne, Jr., and J. F. Hedges, Defendants in Error.

In error to the supreme court of the State of Missouri.

Comes now the said plaintiff in error, William Sensenderfer, and says that in the record and proceedings in the above-entitled cause there is manifest error, and for error said plaintiff in error assigns the following, to wit:

First. That the answer of defendant contains no equity, and all that portion of same setting up new matter by way of equitable defense constitutes no defense to plaintiff's action herein and did not entitle the said defendants to the decree entered by the court in their behalf.

Second. That the trial court admitted improper and illegal testimony offered by the defendants in error and against the objections of the plaintiff in error.

Third. That the trial court refused to give legal and proper declarations of law on the legal issues in the case as requested by the plaintiff in error, to wit, numbers 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, as asked by the plaintiff in error and in modifying declarations numbers 12 and 17.

Fourth. That the court gave of its own motion improper and illegal declarations of law.

Fifth. That the evidence in the case does not support the special finding of facts and decree of the court.

Sixth. That the special finding and decree is contrary to the law as declared by the court.

Seventh. That the finding and decree was against the law and the evidence and the weight of the evidence at the trial and was inequitable.

Eighth. That the finding and decree under the pleadings and the evidence should have been for the plaintiff in error instead of for the defendants in error.

Ninth. That the said Pettis county, Missouri, circuit court nor the supreme court of Missouri had the jurisdiction to render the decree it did.

Tenth. That the said circuit court of Pettis county, Missouri, erred in refusing to sustain plaintiff in error's motions for a new trial and in arrest of the finding and decree.

Eleventh. That the supreme court of the State of Missouri erred in not reversing the decree of the circuit court of Pettis county, Missouri, on account of the errors above enumerated.

Whereupon plaintiff in error prays the court to reverse the judgment of the said supreme court of Missouri, affirming the judgment of the circuit court of Pettis county, Missouri, and to afford him all just, equitable, and proper relief, for which he will ever pray.

L. H. CAMPBELL,
S. P. SPARKS,
By CAMPBELL,
Attorneys for Plaintiff in Error.

[Endorsed:] Sup. Court U. S. 1889, Oct'r term. No. 280. Wm. Sensenderfer, pl'ff in error, *vs.* Samuel A. Kemp *et al.* Assignment of errors. Office Supreme Court U. S. Filed Jan. 15, 1890. James H. McKenney, clerk.

IN THE
SUPREME COURT OF THE UNITED STATES.

WILLIAM SENSENDERFER, Plaintiff in Error,
vs.
SAMUEL A. KEMP, *et al*, Defendants in Error.

No. 280.

PLAINTIFF IN ERROR'S ABSTRACT OF RECORD, ASSIGNMENT OF ERRORS AND BRIEF.

LEVIN H. CAMPBELL,
SAMUEL P. SPARKS,
Attorneys for Plaintiff in Error.

Journal-Democrat Print, Warrensburg, Mo.

IN THE
SUPREME COURT OF THE UNITED STATES.

WILLIAM SENSENDERFER, Plaintiff in Error,
vs.
SAMUEL A. KEMP, *et al*, Defendants in Error.

No. 280.

Error to the Supreme Court of Missouri.

PLAINTIFF IN ERROR'S ABSTRACT OF RECORD, ASSIGNMENT OF ERRORS AND BRIEF.

THE PETITION.

Sensenderfer commenced this suit at law for the possession of the west half of the northwest quarter of section 24, township 47, range 21, Pettis county, Missouri, in the Circuit court of that county, on August the 13th, 1879, against the Defendants in Error, who were the widow and heirs at law of William T. Kemp, deceased. The damages were laid at the sum of $500. Monthly rents and profits

that he straightway took possession of said tract and that the same has ever since said date continued in the open and notorious possession of William R. Kemp and those claiming under him, and that the several owners have made lasting and valuable improvements on it; that William T. Kemp purchased and became the owner thereof in the year 1869, and that he and the Defendants in Error, who are his widow and heirs, have continued in the possession to the present time. The Court further found that at the time of locating said bounty land warrant on said land in June, 1848, by the said William Riley Kemp, *he did not fill out the application for such location himself but signed the same in blank and so delivered* it to the officers of the district land office, who afterward filled up the same, and is so doing through mistake inserted therein section 25 instead of section 24, and erroneously certified said location to the government land office at Washington City, as being in section 25 instead of section 24. The Court further found that in December, 1870, the Plaintiff Sensenderfer attempted to procure the title to said tract from the United States, and for that purpose located a bounty land warrant, etc., upon said tract at the district land office at Boonville, Missouri, and afterwards on April 21, 1871, produced from the United States a patent for the same, and the Court found that at the time of procuring said patent, Sensenderfer had notice of the entry and location of William R. Kemp, and of the said mistake made by the officers of land office concerning said entry and location and with notice of the fact that the equitable title to said title had passed from the government to said W. R. Kemp and was then held and owned by William T. Kemp. The Court thereupon decreed that the title so acquired by Sensenderfer be divested and invested in Defendants.

THE EVIDENCE ON THE TRIAL.

The Plaintiff, Sensenderfer, read in evidence the patent issued to him by the United States, bearing date April the 21st 1871, recited and described in the pleadings, proved his damages, rents and profits, and rested his case.

(See Transcript of Record, pages 17 to 20.)

The Defendants offered evidence tending to establish by the following witnesses: C. W. Fristoe, James I. Kemp, Martha J. Kemp, B. L. Greer, Simeon Payne and James Kemp. That in 1848 or '49, William R. Kemp, took possession of the southeast quarter of the southeast quarter of section 14, township 47, range 21, and enclosed it and put it in cultivation and claimed to have entered it and the northeast quarter of the northeast quarter of section 23 and the west half of the northeast quarter of section 24, township 47, range 21. That this claim of ownership was notorious in that neighborhood. That about 1851 or '52 he departed for the State of Oregon, taking his family and effects with him. That he was reported to have died *en route* to that State, by members of his family. That before leaving he had made a mortgage of the premises so claimed by him to one Wood and Walker.

That about a the year 1853 one William Kemp became the purchaser of all the right, title, interest and estate of the said Wm. Riley Kemp in the said premises, under said mortgage and went into the possession of the portion so actually in the possession of W. R. Kemp, and continued in the possession down until 1859 or 1860, when he inclosed the 80 in controversy and put the north 40 in cultivation and used the south one for pasture; that he continued in possession down to the 26th of February, 1868, openly, notoriously claiming to

of the United States land office well knew that said William R. Kemp never entered said tract in controversy, for they subsequently permitted the north 40 acres of said 80 to be entered by one Berry L. Greer on the 5th day of July, 1854, and caused a patent to be issued to him for the said tract from the United States, and likewise permitted one Simeon Payne to enter the south 40 and issued a patent to him bearing date May the 1st, 1854; that Greer and Payne entered into possession of their respective parcels and have ever since retained possession of same.

The answer then sets up that Sensenderfer's occupation seems to have been to search and discover *supposed* defects (*Queer*. How could he discover defects unless they existed in point of fact,) and by fraud and cunnning to obtain patents from them to himself so as to defraud the rightful and equitable owners of their estates and homes, and by inquiry and investigation in the pursuit of said business, discovered that no patent had issued to William R. Kemp and all those claiming under him for the land in suit, did on the 20th day of April, 1871, with a fraudulent intent and purpose to wrong and cheat the said William T. Kemp out of his said land and to deprive him of his homestead thereon, obtained from said government a patent for said land to himself and is trying to obtain possession of said tract thereunder. That said Plaintiff holds said land in trust for the Defendants. The answer then prays that he be declared a trustee for said Defendants of said legal title, and that the same be divested out of him and vested in the Defendants. (The answer then sets up the statute of limitations which is not here noticed for the reason that it seems to have been abandoned, as the Circuit court made no findtng on that issue.)

THE REPLY.

The reply of Plaintiff admitted the issuance to him by the United States of the patent to the land in controversy, at the date mentioned in said petition in pursuance of the purchase or entry thereof with the military land warrant on December the 28th, 1870, at the United States district land office at Boonville, Missouri, and further avered that he claimed the legal and equitable title to said tract by virtue of said entry, location and patent.

Admited the issuance to William R. Kemp of the patent for the lands as set forth in the answer.

The reply then averred that said William R. Kemp with military land warrant number 1384, made application to enter and did enter at the district land office of the United States at Clinton, Henry county, Missouri, on June the 13th, 1848, the following described tracts of land to-wit :

The southeast quarter of the southeast quarter of section 14, the northeast quarter of the northeast quarter of section 23, and the west half of the northwest quarter of section 25, all in township 47, range 21, and received a certificate or duplicate receipt from them, evidencing such entry.

The reply then traversed specially all the other allegations of the answer.

There was a trial and the Court found for the Defendants and made and entered of record a special finding of facts and a decree in accordance with the prayer of the petition. The said finding and decree was substantially as follows: That William Riley Kemp on June 13, 1843, entered the tract in controversy with military land warrant No. 1348, and received a certificate evidencing the location and entry thereof;

at $50. The petition was in the ordinary form for action of ejectment. (See Transcript of the Record, pp. 3 and 4.

THE ANSWER.

All the Defendants answered jointly admitting the possession of the land, and traversing all the other allegations of the petition. It then proceeded to set out at some length, certain matters as an equitable defense, which were substantially: That on June the 13th, 1848, one William R. Kemp located, entered or purchased, with military land warrant No. 1384, at the local land office of the United States, at Clinton, Henry county, Missouri, the above described tract of land, and the following contiguous tracts, to-wit:

The southeast quarter of section 14, (evidently intending the southeast quarter of the southeast quarter of section 14) and the northeast quarter of section 23, (evidently meaning the northeast quarter of the northeast quarter of section 23) all in township 47, range 21.

And received from the register and receiver of said land office a certificate, evidencing the fact of such locatien or entry; that thereupon said Kemp took open, notorious possession of all said tracts, under claim of title, and so continued down to 1853, when he sold and conveyed the same to William R. Kemp, and by his deed delivered to him the possession thereof, and that said William Kemp took and continued in possession until February the 18th, 1868, when he sold and conveyed the same by his deed to one W. D. Cummins and delivered to him the possession, who took and held the same under claim of title, occupied and improved same until January the 26th, 1860, when he sold and conveyed the same to Defendant's ancestor, Wm. T. Kemp,

who took and held the open, notorious and adverse of same under claim of right and title down to the 23rd day of October, 1874, at which time he died intestate, and that the claim or title and possession so asserted by him, descended to and vested in these Defendants as his widow and heirs. That many years ago William T. Kemp, the original purchaser or locator, departed this State for the State of Oregon, but died before reaching his destination, and that Defendants are informed and believe that said W. R. Kemp took with him the above mentioned certificate of location or entry, and that it was lost by him with other papers. That in 1871 W. T. Kemp, Defendant's ancestor, discovered that neither W. R. Kemp nor those claiming and holding under him, had ever received a patent from the United States for said west half of the southwest quarter of section 24, township 47, range 21, and that he applied to the general land office of the United States for a patent therefor. That the commissioners of such land office forwarded to him an exemplified copy of the patent theretofore recorded in that office dated June the 1st, 1850, issued to said William R. Kemp, for the lands so entered by him as aforesaid, except that the tract in controversy was not included in such patent, but in lieu thereof the west half of the northwest quarter of section 25, township 47, range 21; that the variation of the patent from the certificate of entry so alleged to have been issued to said W. R. Kemp, "was and is a manifest error and mistake of the officers or agents of the government aforesaid." That said William R. Kemp did not and could not have entered said tract in section 25, in connection with the other tracts, with said military warrant.

The answer further alleges, that the officers and agents

be the owner of it when he sold and delivered the possession to one W. D. Cummins who took possession, cultivated and used the premises down until the 26th day of January, 1869, when he sold, conveyed and delivered the possession of it to William T. Kemp, who occupied it, cultivated it, and improved it down to the 23rd day of October, 1874, when he died leaving the Defendants in error as his widow and heirs at law, and that they have been in possession ever since; that diligent search for the certificate of entry or duplicate receipt set out in the answer as having been issued to William Riley Kemp, was made among the papers of William T. Kemp, deceased, both by his administrator and by his widow. None of these witnesses testified to any knowledge that the said certificate of entry or duplicate receipt ever existed; none of them claim to have ever seen it or knew of its existence. The testimony was that the different occupants had paid the State and county taxes on the land in controversy.

The witness, James Kemp, testified among other things, as follows:

"I don't know anything about Plaintiff entering this land "except what has been told me. A man named Widdi- "combe has been here twice to see me about a certain 80 "acres of land which I supposed to be the land in contro- "versy in this suit. I don't know his given name. Can't "state the date when he came to see me. I suppose it was "a short time before the suit was brought or a short time "before the land was entered. I don't remember the dates. "The second visit was made about the middle of winter; I "think in extreme cold weather. First visit was made in "the spring or fall, I don't remember which. I don't know

"where Widdicombe lives. He was around soliciting to "get land patents for parties who hadn't yet obtained "them. He told me on the first visit, that the books at the "land office showed that a certain 80 acres of land in this "county was not marked as having been entered, and that "he had been to the recorders office in Pettis county, and "found the land in Wm. Kemp's name; he found that Wm. "Kemp was dead and that I was his administrator, and he "then inquired for me and came to see me. I told him that "the land did not then belong to my brother's estate, that "my brother, Wm. Kemp, had sold it to W. D. Cummings, "and he had sold it to W. T. Kemp. He then asked me if I "knew any patents had been obtained, and if so where they "were. I told him I knew nothing about the patents, that "the land had been entered by Wm. R. Kemp, as I had un- "derstood, and he told me he would give me time to go "among the connection and see if I could hear of or find "any patent, and if no patent was found the land would be "entered shortly. He didn't state at that time who would "enter it. I did not say anything to him about improve- "ments on the above land as I recollect. I think I told him "that Wm. T. Kemp was then living on the land. I don't "remember that anything furthur was said in regard to the "land at that time. I don't remember how long it was be- "tween the two visits. On the second visit he asked me if "I had found any patents. I told him I had not. He then "told me the land was entered. I asked him by whom and "he didn't give me the man's name as I recollect, but told "me that it was a Dutchman. I asked him where he lived, "he told me he lived down at St. Louis. In the first con- "versation I had with Widdicombe, I told him that William

"R. Kemp had entered 160 acres of land. We were stand-
"ing near the corn crib and I marked off the land for him
"and showed him how the two eighties lapped."

The Defendants then introduced Mentor Thompson, who testified as follows:

"I live in Sedalia. I have lived in Pettis county since
"1834. I have been county surveyer. Was made surveyor
"in 1835 or '36, and filled that office for thirty years. Dur-
"ing that time I surveyed a great deal of land in all parts of
"the county. I have entered a great deal of land in
"the county for myself and others. I was in the habit of
"making such entries at the land office. I know the land in
"controversy. I surveyed the land for William R. Kemp.
"I don't think I surveyed any other lands at the time. His
"object was to get the line of the land he owned. I made
"no record of the survey. The survey was not made to
"establish any corner. It was made in the spring of 1849.
"I found the original government corner but established
"none myself. It was made to show him the lines. The
"numbers of the land surveyed was the west half of the
"northwest quarter of section 24, and the southeast quarter
"of section 14, and the northeast quarter of the northeast
"quarter of section 23, township 47, range 21. The land
"in 24 was prairie. The land was all prairie. I put a
"stake at the quarter section corner between 23 and 24, at
"the southwest corner of the 80 in controversy, and I put a
"rock at the section corner between 13 and 14 and 23 and
"24. William Riley Kemp was not present when the sur-
"vey was made; he furnished me the numbers of the land;
"he gave me the certificate of location. I made the survey
"from this certificate. I, of course, read it. The numbers

"contained in it were the same I have given you. I was "familiar with such certificates. It was regular in form; I "thought so. I handled a great many such certificates. I "frequently made surveys from such certificates. It pur- "ported to be a certificate of location. It was signed by the "proper officer. I don't know by whom it was signed. I "think it was dated in 1848. Had only been entered a short "time when I made the survey. Henry Rector claimed that "Kemp had not entered this land. In order to satisfy him, "produced the certificate. They quarrelled some time "about it; in order to satisfy him Kemp went to the house "and got the certificate. This was done before the survey "was made. It only called for 160 acres. I have never "seen the certificate since. I understood that William Riley "Kemp moved to Oregon. There was no improvements "on the land at the time I surveyed."

CROSS-EXAMINED.—"I made the survey in 1849. I think "we started from the northwest quarter of section 36. I "took the certificate in my own hand and read it. I think "it was signed by Watson as receiver. I think only one "officer signed it. I don't think both the receiver and reg- "ister signed it. I recollect reading it, and it satisfied me "that it was such a paper as emenated from the land office. "From it I got the numbers by which I made my survey. "From the time I made the survey down until I heard of "Sensenderfer's entry I had nothing to fix the date of sur- "vey in my mind. The name of the land office, 'Clinton,' "was printed. I don't say it was impossible for me to be "mistaken. I don't think I am. I don't know the number "or date of the certificate."

The Defendants then further offered evidence by witness-

es, Thomas O'Geary, one Mat Umstadt, and Samuel Swisher, Respondent in number 281 on this docket, tending to establish their recollection of conversations with Sensenderfer, the Plaintiff in Error, to the effect that he was at the time of making the entry in controversy, residing in Boonville, Missouri, the site of the district land office, and was examining the records of said office for vacant land. That he entered about that time and prior a considerable amount of land shown to be vacant by the records in that office. That he went to Boonville to hunt up, examine, and enter lands. He said he had a lawyer in Washington City who would help him. He said it was his business to look up lands to see if he could find any mistakes in the entries of lands. That he had examined the records a good deal. He found in Johnson county, Missouri, there were several pieces were the parties had made mistakes and that he was looking them up.

The Defendants then further offered evidence tending to establish that the United States district land office at Warsaw, Missouri, was burned in the fall of 1861. The day after the fire, saw lots of scorched and burnt papers from the burnt buildings scattered around town.

The Defendants then established by documentary evidence that the land office at Warsaw, containing all the books and papers pertaining to lands entered in the dirtrict were destroyed in the fall of 1861.

The Defendants then read in evidence the deposition of Gustavo Riche, taken on the 30th of August, 1875, wherein he testified that he was, at that date, and had been since the 1st day of July, 1874, register of the United States land office at Boonville, Missouri.

It was further established by the testimony of this witness, that according to the records on file in that office, that on June the 13th, 1848, W. R. Kemp, assignee of Thomas W. Henley, located military bounty land warrant number 1384, act of February 11th, 1847, on the following described tracts of land: the southeast quarter of the southeast quarter of section 14, the northeast quarter of the northeast quarter of section 23, and the west half of the northwest quarter of section 25, all in township 47, range 21, and that also the northwest quarter of the northwest quarter of section 25 township 47, range 21 was entered by Berry L. Greer, January 16th, 1854, and that the southwest quarter of the northwest quarter of section 25, township 47, range 21, had been entered by Simeon Payne, November 29th, 1853.

The Defendants then read in evidence a copy of a letter from the commissioner of the general land office, to the register and receiver dated February 12th, 1863, to the register and receiver of Calhoun, Missouri, showing all the records of Warsaw, Missouri, had been destroyed, and that the land office was ordered removed to Boonville, Missouri, and that the books from which the register, Gustavo Reiche, testified were copies from the general land office at Washington, D. C. (See copy of the records from the Boonville office attached to deposition of Reiche, page 41 of the transcript.)

George Ritchey, the receiver, testified: I have never seen the original records of the Warsaw office, and this office embraces the district of lands embraced in the Warsaw office. That district was formerly known as the Calhoun or Western district of Missouri.

John N. Gott testified that he was the receiver of the Boonville land office from February '70 to February 1st, '74, and he was clerk in the office for a year prior to that time. He identified the books from which Gustavo Reiche testified; said these were the only tract books used in the office pertaining to the land mentioned in them; that he had been acquainted with the Plaintiff since the spring of '70; that he got acquainted with him there in the office; that Sensenderfer remained there a greater portion of the following two years; that he had no position in the land office during that time; that he was at the land office nearly every day during the two years. He appeared to be making examinations of the records with the view to entering and locating lands. There was no one assisting him. His examinations were confined to the tract books. The method pursued by Sensenderfer in making the examinations of the records in this office, during the time he was here, was to check off in pencil on plats the land that had been entered, as appeared by the tract book. The vacant description on the plats were supposed to show the vacant public lands, and from these he made his entries. The rule with regard to entries made under military land warrants in the office, was to make them in red ink on the tract books in the office, giving the description, the area, the name of locator or assignee, the date of location, and number of the warrant, and the act under which the warrant was issued. There was in addition to the tract books, a book or register known as "the Register of Warrant Locations." All warrant locations were posted in this book. The entries in the tract books as certified from Washington, were not always found to be correct. Sensenderfer, during his stay here, became

acquainted with the fact that there were errors in said book. It was a matter of conversation in the office. This office does not contain all the records kept at the Warsaw office. This tract book purports to be kept on the books of the general land office at Washington City as made up there from the reports from the Warsaw office. Sensenderfer made a number of entries of land in different counties; made some in Pettis, some in Henry, some in Cass, some in Johnson, and some north of the river. I remember hearing Sensenderfer say that after he made his entries that he went to see the lands; found some of them occupied and claimed by other parties.

Cross-Examined.—These tract books were copied from the original tract books at Washington. The tract books that were destroyed at Warsaw were made from pasting the applications made at that office into the tract books. The tract books at Washington, and from which the books in this office were copied, was made up from the reports from the office at Warsaw, and the original books forwarded from the Warsaw office. The tract books in this office contain all the entries made in this district. Mr. Sensenderfer pursued the usual method of those desiring to locate land at this office in his examination of the books of this office. The instructions of the department are to keep them in an accessible place and open to the inspection of those desiring to look at them. All lands not shown to have been entered by this book, are open to entry, and the officers are instructed to regard such as undisposed of and subject to entry.

The Defendant next offered and read in evidence a map of entries filed in the recorder's office at Pettis county, Mis-

souri, and also the entries of said plat in section 14, township 23, range 24, and section 25, township 47, range 21, a copy of which will be found between pages 48 and 49 of the Transcript of the Record. This map of entries had indorsed on it the following certificate:

I, Mark L. Means, register of the land office at Warsaw, Missouri, do certify that this and the accompanying township plats embrace all the territory in Pettis county, Missouri, with the names of the original purchasers indorsed on each tract purchased at said land office, as appears by the original plats, books and records at this office, and the said plats are correctly transcribed with indorsements thereon.

Given under my hand, this the 1st day of July, 1858.

Sensenderfer, by his counsel, objected to the reading of said map of entries in evidence, for the reason that it is not certified and authenticated as required by law, and because the same does not give or purport to give the number of surveys or number of acres in any tract shown thereon.

Deposition of A. C. Widdicombe, of Boonville, showed he knew Plaintiff there, and witness got for Plaintiff a copy of Wm. R. Kemp's application from Washington, sometime after the Plaintiff made the entry of the land in dispute. Witness says in the ten years before his deposition was taken (August 1875) he made 100 land entries at the Boonville office, some of them of lands in Pettis county. That he has a brother, W. H. Widdicombe, who in 1870 and the early part of 1871, was engaged in assisting men to perfect land entries and get patents, but that he did not enter any land. That witness entered 40 acres in section 6, township 45, range 23, in Pettis county, January 2d, 1869, and Plaintiff entered 80 acres in the same section January 26th, 1871. Witness is brother-in-law of a former register of the Boonville office, and has been around the office very

much since 1864, but never was employed in it. That he often met Plaintiff in the office and city, but Plaintiff was reticent and did not communicate with or consult him. That witness was in Washington about January 1872, and there got a letter from Plaintiff, asking him to get a copy of the Kemp application, and he then got it for Plaintiff.

One Holden, clerk in the general land office at Washington, testified as an expert in handwriting by his depositions, and said he thought the writing in the application of Kemp, there on file and shown to him, and the signature of W. Watson, register, were the same handwriting.

John F. Philips, then M. C. and in Washington, testified by deposition, that he knew W. Watson, register, very well, and knew his handwriting, and he had no doubt the writing in said application was that of said Watson.

Both witnesses agreed the signature of Kemp was not in Watson's handwriting.

Defendants put in evidence a patent from the United States to Simeon Payne, of date May 1, 1854, to the southwest quarter of the northwest quarter of section 25, and one of date July 15, 1854, to B. L. Greer, for the northwest quarter of the northwest quarter of section 25, all in township 47, range 21, to which Plaintiff objected because irrelevant and they do not tend to prove any issue. The objection was overruled and Plaintiff duly excepted.

Defendant put in evidence a certified copy of military bounty land warrant No. 16907, and assignment of it to A. C. Widdicombe, and by him to Plaintiff, at about December 28, 1870, and Plaintiff's application of that date made at the Boonville land office, to locate the same on the land in dispute, to which plaintiff objected, because Defendants ad-

mit Plaintiff had the legal title, and they cannot show to the contrary or show defects in the preliminaries to such title. Objection was overruled and Plaintiff duly excepted.

Defense rested.

Plaintiff in rebuttal read deposition of W. H. Widdicombe who said, the last of 1870 and the first part of 1871 he was in Pettis county engaged in finding the owners of land that had been entered, and the patent had not been delivered, and getting them to employ him to get patents for them. In that business he called on James Kemp, whose Deposition Defendants read, because he was administrator of one estate, and some of the land on witness' list as entered and patent not delivered, was of that and other of Kemp's land, and he wanted them to employ him to get the patent. After that and about the last of March or the 1st of April, 1871, he having no acquaintance then with Plaintiff, he got a letter at Sedalia from Plaintiff, who wrote to him by advice of witness' brother, A. C. Widdicombe. The letter asked him to see if certain lands, among other that was in dispute, was assessed to anybody, and if so, who, and he did. Says he thinks he found this assessed to the estate of one Kemp, and so wrote or reported to Plaintiff. That he afterwards called again on Kemp, and Mr. Kemp was unable to find patent to the lands witness so had on his list as not patented, but refused to employ him, saying that Mr. Thompson done all such business for him; and witness then had and showed Kemp, Plaintiff's duplicate and talked to him about Plaintiff's entry, but Kemp, said nothing to him about anyone being in possession or claiming this land. Witness stated fully how he knew the date of his receiving the letter from Plaintiff, and that he visited Kemp the sec-

ond time after that. Plaintiff put in evidence an exemplification of a patent from the United States to W. R. Kemp, dated June the 1st, 1850, to the southeast quarter of the southeast quarter of section 14, and the northeast quarter of the northeast quarter of section 23, and the west half of the northwest quarter of section 25, all in township 47, range 21, showing the same was entered by said Kemp with military bounty land warrant No. 1384, issued originally to one T. W. Hendley, under act of February 11, 1847.

Plaintiff put in evidence a certified copy of Kemp's original application to enter said land, as follows :

"I, William R. Kemp, of Pettis county, Missouri, hereby locate the southeast quarter of the southeast quarter of section No. 14, the northeast quarter of the northeast quarter of section No. 23, and the west half of the northwest quarter of section No. 25, in township No. 47, of range 21, containing 160 acres, in satisfaction of the within warrant.

June 13th, 1848. WILLIAM R. KEMP.

Attest: W. WATSON, Register. DANIEL ASHBY, Receiver.

We certify the above location is correct, and being in accordance with the law and instructions.

W. WATSON, Register.
DANIEL ASHBY, Receiver."

Plaintiff put in evidence a paper as follows :

" Abstract of lands sold at the land office at Clinton, Mo., from the first day of March 1848, to the 28th day of February 1849, inclusive: * * * * * *

June 13th, 1848, William R. Kemp, 80 acres, west half of the northwest quarter of section 25, township 47, range 21.

* * * * * *

STATE OF MISSOURI, }
Office of the Register of Lands. }

I, James E. McHenry, register of lands for the State of Missouri, certify the foregoing entry to be copied correctly

from the report of lands sold at the United States land office in Clinton, Mo., from March 1st, 1848, to February 28th, 1849, as the same is of record in Book No. 8, of record of sales of United States lands, now on file in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said office at the City of Jefferson, this 29th day of September, 1879.

(L. S.) JAS. E. MCHENRY,
Register of Lands."

Plaintiff read a certified copy of the record in the general land office at Washington, of a letter from the commissioner of the general land office, of date May 22d, 1855, to the register of the land office at Plattsburg, Mo., from which we extract the following: "You also appear to be laboring "under a misapprehension in supposing the application of a "purchaser to be a mere matter of form. Such is not the "fact. By the act of Congress, approved Feb. 24th, 1810, "every person making application at any of the land offices "of the United States for the purchase at private sale of a "tract of land is required to produce to the register a mem- "orandum in writing describing the tract, which he shall "enter, by the proper number of the section, half section or "quarter section (as the case may be) and of the township "and range, *subscribing his name thereto*, which memoran- "dum the register shall file and preserve in his office. Such "*written application forms the foundation of every entry*, "*and is made to govern in all cases* in deciding the question "as to what particular tract of land was entered, and under "no circumstances is it admissable to alter in any manner "the affidavit and application of the purchaser. The filling "up of the application is no part of the official duty of the "register or receiver. If requested to do so, you may fill "up the application, but when signed by the applicant it be-

"comes his own act, and he alone is responsible for any er-
"rors that may exist therein."

Plaintiff himself testified that he went to Boonville to live in the fall of 1870 and learned from the tract book in the land office this land was vacant, and entered it a few months after he went there. That he knew nothing of the land except as shown by the books in the land office, till he had entered and got his patent. That in September, 1871, he made his first visit to Pettis county. That there is a plat book in the land office showing what is timber and what prairie, and when he found a piece vacant he looked to see if it was timber or prairie, and if it seemed favorable he entered it. He made all his entries that way. He knew nothing about the settlement of Pettis county. Never asked anybody about the land he entered, or was told about it, before he entered it. In March 1871, at suggestion of A. C. W., he wrote his brother W. H. Widdicombe, at Sedalia, that if he got near his lands, (sending him numbers) to see them and report how they lay, and whether good or not. On April 5th, 1871, W. H. W. reported to him in person at Boonville. He said old man Kemp told him that Wm. T. Kemp owned this and it lay outside of Kemp's big farm, and was prairie, and that Kemp claimed it was entered long ago. This was the first that witness knew of any adverse claim to this land. Plaintiff then went to the land office to look for Kemp's entry, and found it in section 14, 23 and 25. This was the first he ever noticed of Kemp's entry on the books. Plaintiff did not learn any one was in possession of this land until his visit in September. That on his first visit to Pettis county he was in Sedalia, and met M. M. Lampton, who told him he, Lampton, had previously entered the

land Plaintiff had then entered, and which was claimed by Swisher. Plaintiff then went and found this land assessed to W. T. Kemp. Met M. Thompson that trip but did not converse with him about lands. His first conversation with him was in the fall of 1872. After seeing Thompson in fall of 1872, Plaintiff made a trip to Southwest Missouri to see lands he had entered, and on the way back stopped at Windsor and got O'Gary to take him. Plaintiff denied and contradicted all of O'Gary's testimony as to conversations Plaintiff had with him.

Plaintiff said he made no more entries after that. When he found some of his entries claimed by others, it scared him, and he quit entering. That O'Gary testified in the trial of a suit Plaintiff had with Neill about that land at Warrensburg, and did not testify near as strong as on this case. Witness also said the conversation he had with Swisher was in the fall of 1872, just after he was with O'Gary, and denied saying what Swisher said he did. Plaintiff lived in St. Louis 28 years before he went to Boonville. Was in tobacco and cigar business, and dealt some in lands, but never entered any till he went to Boonville. Had owned lands scattered over the State, at one time 4,000 acres in Southeast Missouri. Witness had no knowledge of the existence of a map of entries in Pettis county put in evidence, till after he made his entries.

On cross-examination he said he had been in the wholesale tobacco business in St. Louis, and had customers scattered around in the State while in the tobacco business, but mainly in the river towns and on the steamboats. That he never had been in Pettis county unless it was passing through to Kansas City, and was not certain he had then. He did not

know whether the railroad was completed to Kansas City before he went to Boonville or not. Cannot say he knew the Missouri Pacific railroad run through Pettis county when he went to Boonville. He knew the country near the river was most all settled, but did not know about the interior counties. Knew nothing of immigration to Missouri, except in fall of 1867-'8 and '9, a friend in Carthage wrote him of considerable immigration there. Was in no business from 1860 to 1867 but settling up their old business. From then till 1870 done some real estate business in the city, and had a partner, his partner dealing some in cheap lands out of the city. Plaintiff entered lands in five counties in north Missouri and eight south of the river. When he found there were prior entries of the land in any case, he got his entry cancelled.

Plaintiff went out of wholesale tobacco business in St. Louis in 1860, and from then to 1870 was settling up the old business of the firm, and doing some real estate and house renting business with a partner, who done all the dealing in lands, and Plaintiff rented houses, &c., in the city. The winter of 1868-'69 he spent in New York, settling up old matters. During 1867 to 1870, he had very little acquaintance with the business men of St. Lous. He went to Boonville because he wanted to get out of the city, and because Boonville was said to be a nice place and his wife had a cousin there. He went to the land office because he had nothing else to do. He did not go there to go into any business. Had read of cases where land had been supposed to be entered and it was not, and men made good money by entering it, and he thinks that lead him to go to the land office and look for vacant land. Knew the land office was

there and these accounts may have had something to do with his going there. After he began to search the land records he was there nearly every day. In March, 1871, A. C. Widdicombe told him when he found a vacant tract he should look and see if it had not been entered in some entry including adjoining lands. Knew A. C. Widdicomb who was an attorney at Boonville and saw him come in and examine the land office books, but did not know he was making entries till long after Plaintiff made this entry and knew nothing about him having conflicts and suits about his entries. When A. C. Widdicombe told him there might be prior entries of his lands and how to look for them he thinks he them wrote to W. H. Widdicombe, getting the address from A. C. Wiedicombe.

He found out in March, 1871, that he had some conflicts and it was easier to cancel an entry before the issue of a patent, and wanted to find all his conflicts and get them cancelled before the patents issued. In searching for vacant land he counted the 40 acre tracts entered in a section, and when he found 16 of them entered he took it that was all entered. When he found less he took a plat and marked those that were, and found out those that were not entered. Does not know when he learned the entry in red ink on the tract book meant military bounty entry, but thinks it was not till after he made all his entries, etc.

When W. H. Widdicomb came and reported this land was claimed by Kemp. Plaintiff went and saw Kemp had made the entries in 14, 23 and 25, all on the same day, also that there seemed to be two entries of west half northwest section 25: that if Kemp entered in 24 then there was a mistake. Had not seen this before. He did not learn that

Kemp's entries were not according to law till 1872. He did not have this entry cancelled because there was in fact no conflict with it and he could not get his money back for that reason even if he tried. When he found Kemp claimed the land, he wrote to an attorney at Washington to investigate the matter, and he wrote him the records there showed just the same as those in Boonville, and said the entry was good and he got Plaintiff's patent and sent it to him.

Plaintiff did not know he could not enter the land under his land warrant if Kemp was in possession of it. Did not know there were mistakes in the land office books till after he made his entries. Did you know how well Pettis county was settled. Only knew the books showed very little vacant land in that county and they showed this was prairie. Plaintiff admitted he made no proof when he entered except as shown in his application and warrant, and he never paid taxes on this land and was never in possession of it. W. H. Widdecomb told plaintiff he saw W. T. Kemp and he claimed the land. Witness afterward wrote W. T. Kemp about it. The first time witness ever heard of James Kemp was when his deposition was taken in this case. Plaintiff did not know any one was in possession of this land till he went there in September, 1871, Widdecomb having told him it lay in the prairie outside of Kemp's farm and that Kemp claimed it. He paid Widdecomb $5 for his examination and report. Says he did not say while at Kemp's that time, in presence of Mrs. Kemp, that he sent a man there to see it before he entered it, and he reported it was raw land. He may have said he was sorry it happened as it had, for he felt that way.

On re-examination he said he did not know when he

made his entries that a military bounty land warrant had to be located on land in a body. Also that what he means by a conflict of entries is where some one has a prior patent, or conflict or duplicate, not when there was simply an adverse claim. Plaintiff says he cannot get his money back in this case from U. S., because they say at the general land office the land was vacant when he entered it, and there was no conflict, and they will not cancel his entry.

Plaintiff closed.

Martha Kemp, widow, one of the Defendants, testified that when Plaintiff was at their house he said he was sorry he had anything to do with it and that he paid a man $5 to come and look at the land before he entered it, and the man reported it was not improved and that it lay outside of old man Kemp's farm. She said this was September, 1871, and in the June before, James Kemp, whose deposition was read in this case, had told her a man by the name of Widdecomb had been to see him and told him the land had been entered. Thinks that James Kemp said Widdecomb had been to his house in the spring of 1871.

This was all the evidence. Herein we do not claim to have given the testimony of the witnesses in full. We have given the main points and we think a fair abstract of it. We suppose the court will read it over from the record. And we hope so.

At the request of Plaintiff the court gave the following declarations of law on the legal issues :

No. 1. The effect of the patent to the Plaintiff is to convey the legal title to him.

No. 2. Any error or irregularities in the matters leading

up to Plaintiff's patent can not affect the title conveyed by the patent.

No. 3. Unless W. R. Kemp did in fact enter the land in dispute in 1848, the defense fails. And in considering this question the application is to be considered as the foundation, and unless he applied to enter and did enter the land in dispute, the court can not find that issue for Defendants. In determining what land Kemp did enter the certificate given him does not control. It is only evidence to be considered with other evidence of the fact, and unless considering all the evidence tending to show what land said Kemp did enter, Defendants have established the fact that said Kemp did so enter the land in dispute, the Defendants have failed to make out the defense relied on in the answer.

No. 8. Unless the evidence shows that if Plaintiff had not entered the land in dispute, Defendants would, on the facts proved, be entitled to receive a patent from the United States for the land in dispute, and that when Plaintiff entered said land he had notice of such facts, the defense fails.

No. 9. If Plaintiff is entitled to recover—and it appears from the evidence that Defendant, Martha J. Kemp, has since the death of her husband contracted and rented out the land in dispute, and received the rents thereof—then Plaintiff is entitled to judgment against her for possession and damage for rents and profits, in such sum as from the evidence said premises were worth for that time.

No. 10. Even if there is a misjoinder of parties Defendant, none can take advantage of the fact, but those who are so misjoined, and if they do not take advantage of that fact it makes no difference in this case, and if Plaintiff is entitled to recover he may recover against all the Defendants in

possession of the land, either actually or by tenants when this suit was begun for possession, and rents and profits from the time they went into possession, and down to this time.

No. 15. The statute of limitation pleaded by Defendants is not a bar to this action.

No. 18. The deed from A. S. Walker, trustee, or mortgagee to Wm. Kemp is not of itself sufficient to convey the title of Wm. R. Kemp, to the land in dispute, without further proof of the facts which would authorize a sale under the mortgage.

Plaintiff asked the following declarations of law, which were refused. Plaintiff duly excepting:

No. 4. Even if the law did require that bounty land warrants be located in a body, yet that is directory, and if located otherwise and a patent issue it would not vitiate the title.

No. 5. The Congress of the United States has the exclusive right to provide for the disposal of the public lands of U. S., and to determine to whom it shall be disposed of and how, and has done so: and the courts have no power to interfere with the title conveyed by patent of United States, or to take the title from the one to whom the patent is issued and give it to another, except where said patent has been procured by actual fraud when it should have been issued to such other or when by mistake, and misconstruction of the law of Congress on that subject by the officers of the land department, the patent has issued to one when by proper construction of said law it should have been issued to the other.

No. 6. If there was a mistake, and Kemp did not enter the land he intended to, there was ample means under the act of Congress to correct such error. And as Defendants' grantors did not correct the same, in that way Defendants cannot have the same done by this court basing its action on such neglect.

No. 7. If the Court determine, as matter of law, that there is power in the Court now to correct a mistake, if any was made, by Wm. R. Kemp in entering the west half of the northwest quarter of section 25, when he intended to enter the west quarter of the northwest quarter of section 24, then the acts of Congress for disposal of the public lands and the rules and regulations of land department of the United States and the construction of laws by the said land department and the United States Courts are rules of decision in this Court.

No. 11. Plaintiff, when he entered the land in dispute, was not bound to take notice of any of the deeds read in evidence and is not affected with notice by them or their being recorded.

No. 12. Although W. R. Kemp may, on the 13th day of June, 1848, have received a certificate from the register and receiver of the local land office at Clinton for the land controversy, yet if the court shall find that said W. R. Kemp had not made written application to locate a military bounty land warrant [intended to be on said land] on said land, then said W. R. Kemp never did enter or locate the land in controversy.

The Court gave this one after inserting the part inclosed in brackets, Plaintiff duly expecting.

No. 12. Even if W. R. Kemp did by mistake enter other land when he intended to enter that in dispute, he or his legal representative could only correct that mistake before the entry by Plaintiff. And whether Plaintiff had notice of such intended entry or occupation makes no difference.

No. 14. If Plaintiff brought suit in this Court April 17, 1873, against W. T. Kemp for possession of the land in dispute and the same was removed to the United States Circuit Court, and Plaintiff suffered a non suit therein in November, 1877; and if Plaintiff also brought suit in this Court August 13, 1877, against the widow and heirs of said W. T. Kemp, he having died, and suffered a non suit therein in May, 1880, and brought this suit August 13, 1879, then the Statute of Limitations pleaded in the answer is not a bar to this action.

No. 16. If it appears that one of the heirs of W. T. Kemp is not a party to this action, Defendants cannot have a decree in their favor, if otherwise entitled to it.

No. 17. The mortgage or deed of trust of W. R. Kemp offered in evidence is not sufficient to convey any title or claim except that which W. R. Kemp had at the time. It would not convey after acquired title.

To this the Court added the words "Of such Kemp," and gave it of his own motion, to which Plaintiff duly excepted.

We should have said before, of this deed, that it contains no covenants. Is purely a quit claim and mortgage.

In due time after the finding and judgment of the Court, Plaintiff filed a motion for a new trial on ground of error in admission and rejection of evidence; and refusing proper declarations of law and giving improper ones of the Court's on motion; and that the finding is against the declarations as

given, and against and not supported by the evidence, and is for Defendants when it should be for Plaintiff: and it was for the widow and heirs of Kemp when one of them is not a party: and because of newly discovered material evidence which he could not procure at the trial: and in support of the same filed affidavits of Henry Rector, witness, and Plaintiff, and E. J. Smith, one of the attorneys herein, which affidavits are as follows, omitting the caption and jurats. They were made and filed January 28, 1881:

"The Plaintiff, Wm. Sensenderfer, being duly sworn, says: I did not take any steps to procure the attendance of Henry Rector as a witness to testify in the trial in this case till the trial, because I was present at the taking of the deposition of Mentor Thompson which is filed in this cause at the office of Philips & Vest, in Sedalia, Mo., June 5, 1877, and heard said Thompson then testify. And in that testimony said Thompson stated that Rector, to whom he referred in like manner as in his testimony on the trial in this case, was then dead, though by reading said deposition now on file (the deposition is in fact filed in the case) in this case, I see the fact of the death of said Rector is not written down as a part of said deposition: and I am not acquainted with said Rector, and except as mentioned by said Thompson I never heard of him; and until said Thompson testified herein, I supposed said Rector was dead, and was greatly surprised when I heard said witness testify that said Rector is still living: that soon after and in due time to have gotten said witness to testify in this trial if he had been able to attend then at all. I was about to take a subpœna for said witness to bring him to Court to testify in this case, when I learned from the clerk and sheriff of this Court that since

the trial begun the Defendants had taken out a subpœna for said Rector and had it served on him to come and testify in this case and the said witness was then so feeble and sick that it was impossible for him to come to Court, wherefore believing said facts and as it would be useless to attempt to get said witness to Court on said trial, I did not take out such subpœna; that since said trial I have used every effort to see and get an affidavit of said Rector to ascertain what his testimony would be, and to that end sent twice to Georgetown where said witness resides and went once myself and took a notary with me, and only to-day learned what said witness would testify to and got his affidavit filed herewith; that if a new trial is granted I can get said witness or his deposition for use at the next term of this Court; that affiant does not apply for a new trial for vexation or delay but because he believes he has a meritorious cause of action herein and has been improperly deprived of his rights by the finding and judgment of the Court herein; affiant further says, now that he has seen said Rector, which he did this day for the first time, said Rector is very old and feeble and in bad health, and is somewhat deaf and has only one leg, and affiant truly believes, was, when this case was on trial, so feeble and sick that he could not attend the Court.

WM. SENSENDERFER."

Signed and sworn to, etc., Jan. 28, 1881.

And E. J. Smith, one of the attorneys for Plaintiff, being duly sworn, says: I know the facts set forth in the foregoing affidavit as to the efforts made to get said Rector to this Court as a witness, and to find out what he knew, and that the same is true as above set out in the affidavit of Mr. Sen-

senderfer. I also know that until the testimony of said Thompson upon said trial the attorneys for Plaintiff understood and supposed said Rector was dead, and we were greatly surprised when we learned otherwise.

Sworn to, etc., Jan. 28, 1881. E. J. SMITH.

Henry Rector, being duly sworn, on his oath says: In the year 1849 he assisted Mentor Thompson, the county surveyor, in the survey of some land in the vicinity of the W. ½ N. W. ¼ section 24, township 47, range 21 in Pettis county, Missouri. That according to his recollection Mentor Thompson began his survey at the southwest corner of the W ½ of N. W. ¼ of said section, surveyed the N. W. ¼ of S. W. ¼ of said section. That he does not remember all the lines run but is positive that no survey was made of W. ½ N. W. ¼, section 24, township 47, range 21, which tract of land was then claimed by Riley Kemp. That he was with the surveying party during the day and assisted in said survey by carrying the flag; that he did not carry the chain; that he never, at any time, assisted in the survey of the W. ½ N. W. ¼, section 24 of said township and range; that Riley Kemp at that time lived about a quarter of a mile south of the south line of the W. ½ N. W. ¼, section 24, township 47, range 21; that during the said survey in A. D. 1849 no duplicates were produced by Kemp or any other person describing any land whatever; that he is positive of this, because he had entertained doubts as to whether or not Kemp had entered said land (W. ½ N. W. ¼, section 24, township 47, range 21) and if any duplicate or title papers had been produced describing this land it would have settled the above question in his mind; that it was the general opinion through the neighborhood that Kemp had not en-

tered said land; that he does not remember of being present at any time when Riley Kemp's land was surveyed, or being present or assisting in the survey of any other land in that vicinity, except his own as stated above; that he was subpœnaed in the trial of the case wherein Wm. Sensenderfer was plaintiff and Samuel A. Kemp and others defendants, on or about the 7th of January, 1881, but on account of his illness, inclement weather and old age, being 72 years old, he was unable to obey said summons.

HENRY RECTOR.

Subscribed and sworn to before V. E. Shaw, notary, January 28, 1881.

The motion for new trial was overruled, Plaintiff duly excepting.

Also, in due time Plaintiff filed a motion in arrest of judgment on ground that the answer does not state facts sufficient to warrant the court in giving judgment for Defendants as it did, or any judgment for them. And that the judgment is erroneous in that it is for the widow and heirs of W. T. Kemp when one of the heirs is not a party, and this fact first appeared by the testimony of Mrs. K. on the trial; and that there is no offer in the answer to refund the money paid by Plaintiff to enter the land, and such is not required by the judgment of the court; and on ground of want of jurisdiction in the court to hear the evidence or give the relief sought and given by the court. This motion was also overruled, Plaintiff duly excepting. Plaintiff then filed bill of exceptions and affidavit and bond for appeal, which was granted, and the appeal duly prosecuted to a final determination in the Supreme Court of Missouri, where the finding and decree was affirmed. 83 Mo., 531. (See opinion, pp.

98, 99, 100, trans. Rec.) Sensenderfer thereupon brought the case to this Court by writ of error.

ASSIGNMENT OF ERRORS.

To reverse the finding and decree of the Circuit Court of Pettis County, Mo., and the judgment of the Supreme Court of Mo., affirming same, Plaintiff in error Sensenderfer assigns and relies upon the following errors in the proceedings, manifest on the record:

I.

There was no equity in that portion of the amended answer of Defendants' setting up certain matters by way of equitable defense on which the Circuit Court based its finding and decree. (See Trans. Rec. folios 8, 14: pp. 6, 8.)

II.

The entire evidence in behalf of Defendants to support the finding and decree of the Circuit Court of Pettis county, Mo., was insufficient for that purpose: It consisted wholly of the oral testimony of Mentor Thompson that some thirty-two years prior to that time he had incidentally, while making a survey of William R. Kemp's entry and location under warrant number 1384, seen the original patent certificate, and that it called for the land in controversy instead of the corresponding description in Section 25, T. 47, R. 21. (See Trans. Rec. folios 62, 63, 64, and 65: pp. 30, 31, and 32.)

The map or plat of entries made out by one Means, Register of the Local Land Office of the United States at Warsaw, Mo., July the first, 1858, for the use of Pettis county, Mo., and on file in the Recorder's office thereof, made for the sole purpose of enabling the county to ascertain the claims for the purposes of taxation. (See Rec. Trans. folios 100, 101, and 102: pp. 48 and 49.), coupled with the

testimony of divers witnesses to the fact that the immediate grantee of William R. Kemp, about the year '59 or '60, inclosed the land in controversy—were insufficient to overcome the records and files of the General Land Office, the original application of William R. Kemp to locate warrant number 1384 on the W. ½ of the N. W. ¼, S. 25, T. 47, R. 21, in conjunction with other lands. (See Trans. Rec. folios 144, 145; pp. 70, 71.

The Abstract certified from the Clinton, Mo., Local Land Office of the U. S. to the Register of Lands of the State of Missouri, made after the said location of the said William Riley Kemp, showing that he had entered and located his warrant on June 13th, 1848, on the last above described tract. (See Trans. Rec. folio 146, p. 71.

The patent from the United States to the said Kemp for last described tract, dated June the first, 1850. (See Trans. Rec. folio 142, p. 69.)

III.

The testimony admitted in behalf of the Defendants to the effect that the records of the Local and General Land Office of the United States were false and erroneous by reason of the mistakes of the officers and agents of the United States given in charge of the same, was inadmissible in the proceeding against Sensenderfer, the patentee and innocent purchaser of the legal title from the government without notice of any such matters charged in the answer.

IV.

The Circuit Court of Pettis County, Mo., was without jurisdiction to correct the alleged errors and mistakes of the officers of the United States in the discharge of their official duties in and about the matters complained of in that

portion of their amended answer styled as an equitable defense.

V.

The Circuit Court of Pettis County, Mo., admitted illegal, incompetent, irrelevant and immaterial testimony on behalf of the Defendants, over and against the objections and protests of the Plaintiff in error, among other matters the Court erred in admitting in evidence the plat or map of entries on file in the office of the Recorder of Deeds of Pettis County, for the purpose of showing the contents of the destroyed records of the Warsaw office, and to contradict Kemp's written application, for (1) it was not, nor did it even purport to be a copy of any record of the Warsaw office. (2) It was not competent to establish this fact by secondary evidence, the originals from which the records in the Warsaw office were made up being in existence and on file with the Land Office at Washington, D. C. (3) the plat book was not certified in the manner required by law.

The Statue of Missouri which gave rise to this book was the following provision of the Revenue Law, Sec. 26:

"It shall be the duty of the several County Courts of this State to apply to, and procure from the register of the United States Land Offices in their respective Land Districts plats of all townships and parts of townships, in their respective Counties showing the County line on a scale sufficiently large to show the sections and parts of sections by their legal subdivisions; and all land subject to taxation at that time, and also all private land claims, with the name of "the original claimant, the number of the survey and the "number of acres." Vol. II. Rev. Stat. Mo. 1855, p. 1332.

VI.

That the Circuit Court of Pettis County, Mo., erred in refusing to give legal and proper declarations of law on the legal issues in the case, as requested by the Plaintiff in error, to-wit: numbers 4, 5, 6, 11, 12, 13, 14, 16, 17 and 18: and in modifying declarations numbers 12 and 17, and giving the same as modified.

VII.

That the finding and decree, under the pleadings and the evidence, should have been for the Plaintiff in error, instead of for the Defendant in error.

VIII.

That the finding and decree was contrary to the evidence, weight of evidence, equity and good conscience.

IX.

That the Circuit Court of Pettis County, Mo., erred in refusing to sustain the Plaintiff in error's motions for a new trial and in arrest of the finding and decree of that court.

X.

That the Supreme Court of the State of Missouri erred in not reversing the decree of the Circuit Court of Pettis County, Mo., on account of the errors above enumerated.

BRIEF.

1.

The whole subject matter of the suit is within the appellate jurisdiction of this court. Its decision involves a "federal question."

Rev. Stat. U. S. Sec. 709 (Ed. 1878).

Murray vs. Charleston 6 Otto 432.

Beer Company vs. Massachusetts, 7 Ibid 25.

II.

The equity relied upon by Defendants is predicated of an alleged mistake by the officers of the Local Land Office in matters preliminary to the entry or location, and anterior to the issue of the patent for such errors there was provided by statute an ample, effective, adequate and exclusive remedy.

Rev. Stat. U. S. Sects. 2369, 2370, 2371 (Ed. 1878.)

III.

Equity never contravenes the law; and when there is a complete remedy at law, a bill in equity must be dismissed; this question is jurisdictional and may be raised for the first time in the appellate court.

Oelrichs vs. Williams, 15 Wall, 211.

Wright vs. Ellison, 1 Wall 161.

Sullivan vs. Portland & K. RR. Co., 94 U. S. 806.

IV.

When officers of the land department decide as in this case controverted questions of fact in the absence of fraud or mistake their decisions on these questions are final except as they may be reversed on appeal in that department.

Johnson vs. Towsley, 13 Wall, 73, 91.

Wilcox vs. Jackson, 13 Peters 511.

Lytle vs. Arkansas, 9 How. 33; Shepley vs. Cowan, 91 U. S. 330, 340.

V.

The decision of the officers of the land department in the exercise of their functions was final in this case, and courts cannot properly interfere unless they have misconstrued the law of the case, or there was misrepresentation or fraud

practiced necessarily affecting their judgment and then only *in a proper proceeding.*

Quinby vs. Conlan, 104 U. S. 120.

Steel vs. the St. Louis Smelting & Refining Co., 106 U. S. 96.

VI.

The Circuit Court of Pettis County, Missouri, transcended its jurisdiction when it essayed in a suit between private parties to review, annul, and set aside the solemn decision of the land department of the federal government on a question of fact.

Quinby vs. Conlan, 104 U. S. 420 supra.

Shepley vs. Cowan, 91 U. S. 330, 420.

Moore vs. Robbins, 96 Ibid 530.

Marquez vs. Frizbie, 101 U. S. 473-479.

VII.

The finding of the Circuit Court was contrary to the law stated in declaration number 3, to the effect that William R. Kemp's written application to enter the land must control and determine. (Folio 179, p. 87.)

VIII.

It was error in the court to refuse declarations of Nos. 5 (folio 181 p. 88 Trans. Rec.) as requested by Plaintiff in error for it correctly declared the law lying at the foundation of this case as enucnciated in every adjudication by this court.

See authorities prop. IV.

IX.

The sixth of the series of refused declarations of law requested by Plaintiff in error, (folio 132, p. 88 Trans Rec.) reflected his and the correct theory of the law; its refusal

constitutes reversible error, as it went to the very *pith* and *marrow* of the whole case.

See citations under Prop. II.

X.

The court erred in refusing the twelfth of the series of refused declarations of law requested by Plaintiff in error, (folio 183, p. 89) which declared that as between a patent and the written application of a party to make the entry the latter must control in determining whether such location has been made, was squarely in the face of the law and the rules and regulations prescribed by the interior department of the government.

Rev. Stat. U. S. Sec. 2352 (Ed. 1878.)

Letter of Comr. Gen. Land Office to the register of lands Plattsburg, Mo., Date May 22, 1855. (See Trans. Rec. folio 157, p. 77, 78.

XI.

The finding of the court sitting as a jury was contrary to the law as declared in the series of declarations of law given at the instance of Plaintiff in error numbers 1, 2, 3, 8, 9, 10, 15, 18, (folios 179-180 pp., 87-88 Trans. Rec,) and the decree should be reversed for this reason.

XII.

Under the Missouri Code of Civil Procedure when a cause is tried by the court without the intervention of a jury, declarations of law are necessary to raise for review questions of law passed upon by the court.

Harrison vs. Bartlett, 51 Mo. 170.

Foul vs. City of Cameron, 19 Mo. App. 467.

Spurgeon vs. West, 23 Mo. App. 42.

(*a*) The following is the provision of the code of that

state in force at the time of this trial, Sec. 3655:

"When the evidence is concluded and before the case is argued or submitted to the jury, or to the court sitting as a jury; either party may move the court to give instructions on any point of law arising in the cause, which shall be in writing and shall be given or refused, the court may of its own motion, give like instructions, and such instructions as shall be given by the court, shall be carried by the jury to their room for their guidance to a correct verdict according to the law and evidence." Rev. Stat. Vol. 1 1879.

(*b*) All the declarations of law of the series refused by the court correctly declared the law applicable to this case under the decisions of this court.

XIII.

The Fifth assignment of errors should be sustained. The plat book on file in the Recorder's office of Pettis county, (folio 101, pp. 48, Rec.) Mo., was inadmissible for any purpose, not being a copy nor purporting to be such of any record on file in the Warsaw office, if so, it was incompetent to contradict the original documents on file in the general land office produced in court. by means of exemplified copies.

(*a*) It was made up for the purpose of taxation.

Sec. 36, p. 1332; Rev. St. Mo. 1855, Vol. 11.

United States vs. Wood, 14 Pet. 430.

Taylor vs. Riggs, 1 Pet. 591.

DeLane vs. Moore, 14 How. 253.

XIV.

No foundation was properly laid by proving the loss of the patent certificate alleged to have been issued to Wil-

liam R. Kemp to admit secondary evidence of its contents.

United States vs. Reyburn, 6 Pet. 352.

(*a*) In the absence of the certificate, the next best evidence was the written application of Kemp, on file with the land department.

Blackburn vs. Crawford, 3 Wall. 175.

XV.

The whole evidence of the Defendants in error was insufficient to overcome the record evidence of the land department of the United States, and in similar cases to this the Supreme Court of Missouri theretofore uniformly so held, reversing the findings and decisions of the trial courts in the following cases, which are on all fours with this, to-wit:

Sensenderfer vs. Neale, 66 Mo. 660.

Sensenderfer vs. Smith, 66 Mo. 80.

Widdecomb vs. Mercer, 72 Mo. 583.

(*a*) But that court passes these cases *sub silentio, et cum oculo, averto.*

In the first of the cases supra, the court uses this language: "The Parol testimony tended to show that "Neale had located his warrants upon the land in contro- "versy, but it was not strong enough, nor can we conceive "of parol evidence that would be sufficient to overcome "the record evidence and the Defendant's own written ap- "plication and affidavit to locate the very land for which "the patent was issued to him."

XVI.

The patent of the United States issued to William R. Kemp, June 1, 1850, for the W. ½, of the N. W. ¼,

Sec. 25, T. 47, R. 21. (Record pp. 69-70.) Though it may never have been delivered, had the effect to vest the legal title in him to the said tract.

Opinions Atty. Genl., Vol. 7, part 2, pp. 1404-1405.

United States against Schurz 102, U. S. 388, (Loc. Cit. 397.)

XVII.

The finding of the court was contrary to the declaration of law. No. 13 given at the instance of Plaintiff in error to the effect that the mortgage of William R. Kemp, to A. S. & W. N. Walker, (Rec. pp. 59, 60 and 61) did not make the recitals in the deed purporting to be made in pursuance of it evidence of the matters recited in the deed, for there was no other evidence of the authority to sell, nor of notice, &c., &c.,

Williams vs. Peyton, 4 Wheat 76.

(*a*) There being then no evidence that the notice required by the mortgage deed, nor that the notice recited in the deed purporting to be made under it was given, the deed from William R. Kemp (pp. 61-62. Rec.) was void, and Defendants have no standing in court.

Bigler vs. Walker, 14 Wall. 297.

Shillaber vs. Robinson, 97 U. S. 68.

XVIII.

Sensenderfer was not bound to take notice of the record of deeds from William R. Kemp, but only from those under whom he claimed, and was not affected with notice of the deeds relied on by Defendants.

Maude vs. Rider, 59 Pa., St. 167

Lasey vs. Simpson, 3 Stock, (N. J.)

Bates vs. Norcross, 14 Pick. 224.

Crocket vs. MaGuire, 10 Mo. 34.

Mo. Camunt vs. Patterson, 39 Mo. 100.

74 Mo. 317, 44 Ibid 564.

55 Ibid 23, 46 Ibid 239.

XIX.

Neither the *allegations of the bill, nor the evidence*, bring this case within the recognized equitable doctrine, that when a party by misrepresentation, or fraud, imposes upon the officers of the land department, and his improper conduct has caused the wrongful issuance to a person not entitled to it, of a patent, after such title has passed from the government that a court of equity ought in a suit between such patentee, and the one rightfully entitled to it, to divest the legal title so acquired and invest it in the one having the paramount right, and so it has been held by this Court in the following cases:

Lytle vs. State of Arkansas, 9 How., 328.

Cunningham vs. Ashley, 14 How., 377.

Bernard vs. Ashley, 18 How., 44.

Lytle vs. Arkansas, 22 How., 193.

There is not a scintilla of evidence throughout this entire record to support the following material portion of the special finding of the Chancellor, to-wit: "And the Court further finds that at the time of locating said bounty land warrant on said land in June, 1848 by the said William R. Kemp, he did not fill out the application for such location himself, but signed the same in blank, and so delivered it to the officers of the District Land office, who afterward filled up the same, and in so doing through mistake inserted therein section 25 instead of section 24, and thus er-

roneously certified said location to the General Land Office as being in section 25 instead section 24." This finding was essential to the making of the decree, but finds no support in fact in the record.

The presumption of law is that no such improper and illegal act was done for it is a common, familiar, just and wholesome presumption that officers discharged their duty in compliance with the law and Rules and Regulations of the Department untill the contrary appears.

Butler vs. Maples, 9 Wall, 766.

Galt vs. Galloway, 4 Pet., 332.

United States vs. Crusell 14 Wall, 1.

(*a*) However that matter may be, the ancient and familiar maxim, "*Qui facit per alium, qui facit per se*, never had a more fitting application.

XXII.

The Circuit Court should have granted the motion for a rehearing on the ground of the newly discovered evidence of Henry W. Rector. Sensenderfer had shown all the diligence required of him by law. The evidence was not cumulative, for he had offered nothing to contradict the witness Thompson. If credence had been given to Rector, his testimony would have changed the result, for it would have left Defendants with nothing to stand on. (See affidavits of Sensenderfer, Rector and Smith, pp. 90, 91 and 92, Trans. Rec.)

Mills vs. Sampsell, 53 Mo., 360.

II Thompson on Trials, Sect. 2762.

XXIII.

Sensenderfer was a purchaser for value of the tract without notice of the pretended equitable claims of the Defend-

ants in Error, and those through whom they claim, and as such is entitled to be protected in his purchase. There is not a scintilla of evidence to support the allegation of that portion of the answer charging him with notice of such eqiuty, nor the finding of the Court that he had notice.

Townsend vs. Little, 109 U. S., 504.

Boone vs. Chiles, 10 Pet., 177.

Lea vs. Polk County Copper Co., 21 How., 493.

XXIV.

The Defendants' claim to affirmative relief, based upon the pretended equity, was stale and demurrable for that reason, besides being barred by the Statute of Limitations—ten years. For this relief was not asked until after the lapse of more than thirty years.

II Story's Eq. Jurisp., sec. 1520.

Richards vs. Watkins, 56 Mo., 553.

Zoll vs Carnahan, 83 ibid. 35.

Rogers vs. Brown, 61 ibid, 187.

Ware vs, Galveston Co., 111 U. S., 170.

XXV.

This Court having appellate jurisdiction of this case, by reason of the "Federal qaestion" involved, it becomes its duty to determine every question raised by the Assignment of Errors.

Rev. Stat. U. S., 709 Ed., 1878.

Curtis' Jurisdiction of the U. S. Courts, Student's Series, p. 50, Note 2.

XXVI.

Continuous occupation of the tract under color of title, claim of right and payment of taxes, by those claiming after

and under William R. Kemp, constitute no defence, legal nor equitable, to Plaintiff's Patent, since the legal title remained in the United States until April 20, 1871, when it became vested by patent in Sensenderfer.

United States vs. Thompson, 98 U. S., 486.

Oaksmith vs. Johnson, 92 U. S., 343.

(*a*) Nor did possession and payment of taxes tend to establish the *gist* and *gravamen* of the answer that William R. Kemp, on the 13th of June, 1848, became the equitable owner.

Respectfully submitted.

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